79-652

No. .....

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.,

Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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IN THE

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OCTOBER TERM, 1979

No. .....

NATIONAL BANCSHARES CORPORATION
OF TEXAS, ET AL.,

Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF
THE STATE OF TEXAS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

National Bancshares Corporation of Texas, Cullen/Frost Bankers, Inc., Southwest Bancshares, Inc., Texas American Bancshares, Inc., First City Bancorporation of Texas, Inc., First United Bancorporation, Inc., Mercantile Texas Corporation, and Fort Sam Houston Bankshares, Inc., hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. A, *infra*) is reported at 584 S.W.2d 268. The opinion of the Court of Civil Appeals (App. B, *infra*) is reported at 569

S.W.2d 584. The findings of fact and conclusion of law of the District Court (App. C, *infra*) are not reported.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 20, 1979 (App. D, *infra*). A timely motion for rehearing (App. E, *infra*) was denied on July 25, 1979 (App. F, *infra*). This petition for writ of certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Pub. L. 91-156 (12 U.S.C. § 548) requires the State of Texas to treat national banks as if they were incorporated under the laws of Texas for purposes of determining the Texas franchise tax liabilities of non-banking corporations.

2. If so, whether such federal interference with the exercise of state taxing power is constitutional.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULING INVOLVED

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

12 U.S.C. § 548, as amended by Pub. L. 91-156 (reproduced in full in App. K, *infra*), in pertinent part provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

[1] In view of the constitutional question presented by this case, 28 U.S.C. § 2403 may be applicable. Service, therefore, is being made upon the Solicitor General of the United States.

Ruling 80-0.18 (reproduced in full in App. K, *infra*) issued by the Comptroller of Public Accounts of the State of Texas in pertinent part provides:

> The "location of payor" test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.
>
> • • • •
>
> Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91-156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

STATEMENT OF THE CASE

Petitioners are bank holding companies that are subject to the franchise tax imposed by the State of Texas on all corporations incorporated or doing business in that State. The amount of franchise tax each petitioner must pay is calculated in part by reference to the amount of its annual "gross receipts from business done in Texas."[2] A "location

[2] The franchise tax is computed on the basis of a formula that provides that (1) the taxpayer's gross receipts from business done in Texas is divided by its total gross receipts to determine an

of payor" test is used to determine whether dividends, interest, or other similar payments constitute gross receipts from business done in Texas. *Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967). Under the location of payor test, payments made by a corporation not incorporated under the laws of the State of Texas do not constitute gross receipts from business done in Texas for the purpose of computing the recipient's franchise tax liability. The location of payor test is an administrative rule of such long standing that it may not be changed or departed from "in the absence of clear statutory authorization." *Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d at 180.

For the period prior to January 1, 1973, respondent Comptroller of Public Accounts of the State of Texas treated dividend and interest payments received from national banks, wherever located, as gross receipts from business done outside Texas, because such banks are chartered by the federal government under the National Bank Act, 12 U.S.C. § 21 *et seq.,* and are not incorporated under the laws of the State of Texas. Effective January 1, 1973, the federal statute governing state taxation of national banks, 12 U.S.C. § 548 (1970), was amended by Pub. L. 91-156 to provide in pertinent part as follows:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

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allocation percentage, (2) the allocation percentage is multiplied by the taxpayer's total capital as of the end of the preceding year to determine taxable capital, and (3) the taxable capital is multiplied by the applicable tax rate. TEX. TAX. – GEN. ANN. arts. 12.01-12.22 (Vernon 1969 & Supp. 1978-1979).

In direct response to the amendment of this federal statute, the Comptroller published Ruling 80-0.18 on April 18, 1974, which stated:

> The "location of payor" test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.
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> Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. *Public Law 91–156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).* (Emphasis added.)

The application of this Ruling to petitioners, which receive substantial dividend and interest payments from national banks with principal offices in Texas, caused the assessment of additional aggregate franchise taxes in excess of one million dollars annually.

Petitioners paid the additional franchise taxes assessed pursuant to Ruling 80-0.18 and then brought this lawsuit in the District Court of Travis County, Texas, to recover the additional taxes so paid, alleging, *inter alia,* that Pub. L.

91-156 did not permit the taxation in question. App. G, *infra,* at G-9. The district court found that the Ruling "was promulgated as a direct result of the enactment of Public Law 91-156," App. C, *infra,* at C-1, but held that the Ruling was valid as promulgated.[3] Petitioners again properly raised the federal questions sought to be reviewed herein by motion for new trial, App. H, *infra,* at H-2, and preserved them in the Court of Civil Appeals by point of error. *See* Appellants Bank Holding Companies' Brief in the Court of Civil Appeals at 2-3, 8.

The Court of Civil Appeals, Third Supreme Judicial District, reversed. The court reasoned that Pub. L. 91-156, upon which the Comptroller relied as the sole authority for the issuance of Ruling 80-0.18, "merely remove[d] restrictions on state taxation of national banks," and "provide[d] authorization for the states to levy modern types of taxes on banks. . . ." App. B, *infra,* at B-10. Accordingly, the court held that the federal statute neither required nor authorized the issuance of Ruling 80-0.18:

> . . . the federal statute simply allows the states to treat national banks as state banks for purpose of equal taxation of banks. The concept thus provided is for equal taxation of banks and is unrelated to taxation of dividends and interest from national bank stock in the hands of corporate stockholders.

[3] The only legal issue addressed by the district court was whether Ruling 80-0.18 was invalid under 1971 Tex. Gen. Laws, Ch. 292, art. 7, § 1 ("H.B. 730"), which provides in pertinent part that "[t]he passage of Public Law 91-156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby. . . ." The district court concluded, without elaboration, that petitioners "were not institutions affected by the passage by [*sic*] Public Law 91-156 within the meaning of art. 7 of House Bill 730." App. C, *infra,* at C-2.

Id., at B-11.[4] The Court therefore determined that the Comptroller had acted without authority in promulgating the Ruling and that the Ruling was invalid and unenforceable.

In turn, the Supreme Court of Texas also reversed. In that court, respondents argued that Pub.L. 91-156 amounted to a federal "edict" to the State to impose the taxes called for by Ruling 80-0.18 and that the intermediate appellate court's refusal to enforce that Ruling "ignores and affronts the directive of P.L. 91-156" in violation of the Supremacy Clause of the United States Constitution. Respondents' Application for Writ of Error at 18, 21.[5]

Without explicitly endorsing this argument, the Supreme Court acknowledged that the Comptroller had based the "change in taxation policy [represented by Ruling 80-0.18] on Pub. L. 91-156 . . . ," App. A, *infra,* at A-5, and held that the Comptroller had "correctly ruled that, under the location of payor rule, interest and dividends derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax." *Id.,* at A-11-12. Although the court thereby applied Pub. L. 91-156 so as to require imposition of additional state taxes on nonbanking institutions, the court did not respond to petitioners' argument that the federal statute, if so construed and applied, would

[4] In the alternative, the court held that to the extent that Ruling 80-0.18 was based upon Pub. L. 91-156, H.B. 730 barred the Comptroller from imposing any additional tax pursuant to that Ruling.

[5] *See also* Respondents' Application for Writ of Error at 21-22:

> The passage and enforcement of P.L. 91-156 [12 U.S.C. § 548] confronted Petitioner Comptroller with the latest edict of Congress . . . and such edict, besides expanding the types of state taxes allowed on national banks, also directed that national banks, *for the purpose of any tax law,* 'be treated as a bank organized and existing under the laws of the State' of its principal location.

represent an unconstitutional infringement upon state taxing power. *See* App. I, *infra;* App. J, *infra.*[6]

In upholding Ruling 80-0.18, the court did not suggest that the Ruling constituted a change in the location of payor test. To the contrary, the court referred approvingly to *Humble Oil & Refining v. Calvert, supra,* and did not call into question that decision's explicit premise that no change in the location of payor test could be made in the absence of prior state legislative authorization. Accordingly, the judgment below rests solely upon the application of Pub. L. 91-156 and does not rest upon any independent state ground.

REASONS FOR GRANTING REVIEW

The Supreme Court of Texas has applied an important federal statute of broad, nationwide scope[7] in a manner that raises serious doubts concerning that statute's constitutionality. By construing the federal statute, Pub. L. 91-156 to mandate the imposition of new and additional state taxes on nonbanking institutions, the court below has approved the type of federal interference with integral state governmental functions that this Court specifically prohibited in *National League of Cities v. Usery,* 426 U.S. 833 (1976). This case therefore presents questions of grave significance to the proper accommodation of state and federal powers under the United States Constitution.

1. The Supreme Court of Texas incorrectly applied Pub. L. 91-156. That legislation was not intended, and

[6] In reversing, the court also held that H.B. 730 did not prevent the imposition of additional franchise taxes on nonbanking institutions. *See* App. A, *infra,* at A-2, A-12.

[7] This Court already has had occasion to determine the proper construction of the savings clause of Pub. L. 91-156. *See Chase Manhattan Bank, N.A. v. Finance Administration of New York,* 99 S. Ct. 1201 (1979).

should not be construed, to affect the taxation of nonbanking corporations such as petitioners. The sole concern of Congress in enacting Pub. L. 91-156 was with the state taxation of national and state banks. The court below clearly erred in extending the reach of Pub. L. 91-156 beyond this specific area of congressional concern.

Pub. L. 91-156 represents the congressional response to this Court's decisions in *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339 (1968), and *Dickinson v. First National Bank of Homestead,* 393 U.S. 409 (1969), *aff'g,* 291 F. Supp. 855 (N.D. Fla. 1968). *See, e.g.,* H. R. Rep. No. 91-290, 91st Cong., 1st Sess. 6 (1969); 115 Cong. Rec. 19909 (1969) (remarks of Rep. Brown); *id.* at 35400-01 (remarks of Sen. Holland). In those cases, this Court held that Federal law prohibited the states from subjecting national banks to certain specified nondiscriminatory taxes. The purpose of Pub. L. 91-156 was to undo those decisions by giving "the States and their subdivisions the opportunity to tax banks within their jurisdiction in the same way that they tax other business...." *Id.* at 35399 (remarks of Sen. Proxmire). *See also* H. R. Rep. No. 91-290, *supra,* at 3; S. Rep. No. 91-530, 91st Cong., 1st Sess. 1, *reprinted in* [1969] 2 U.S. Code Cong. & Ad. News 1595. This purpose was achieved by mandating state tax parity between national and state banks. *See* H. R. Rep. No. 91-290, *supra,* at 1. But the establishment of such tax parity was all that Congress intended:

> The bill provides that national banks shall be subject to the same taxation as a State bank. The bill says nothing more.

115 Cong. Reg. 19908 (1969) (remarks of Rep. Patman). In short, the sole concern of Congress in enacting Pub. L. 91-156 was "to clarify the liability of national banks for

certain taxes . . ." CONF. REP. No. 91-728, 91st Cong., 1st Sess. 1, *reprinted in* [1969] 2 U.S. CODE CONG. & AD. NEWS 1601. Congress had no intention of controlling, interfering with, changing, or otherwise affecting any state's taxation of institutions other than banks.

It follows that the Supreme Court of Texas should not have applied Pub. L. 91-156 in a manner that requires the imposition of additional state taxes on nonbanking corporations. That statute should be given the narrow construction that reflects the limited legislative objective underlying its enactment. Pub. L. 91-156 was intended to apply, and therefore should apply, solely to the taxation of banks. That construction of Pub. L. 91-156 is especially appropriate, moreover, in view of the fact that a broader reading would impinge upon the states' own legislative choices respecting the proper objects, and the proper extent, of state taxation. As we discuss further below, serious constitutional doubts are raised by a construction of Pub. L. 91-156 that would require the states to change their manner of taxing persons other than banks. The court below improperly departed from settled practice in failing to construe Pub. L. 91-156 in a manner that would avoid such doubts. *See, e.g., Crowell v. Benson,* 285 U.S. 22, 52 (1932).

2. As applied by the Supreme Court of Texas, Pub. L. 91-156 affirmatively requires the State of Texas to impose additional franchise taxes on petitioners and other similarly situated nonbanking corporations. Such direct interference with state taxing power is an impermissible infringement upon the rights reserved to the states by the Tenth Amendment to the United States Constitution. Although Congress possesses broad power to regulate commerce among the states, it "may not exercise that power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *National League of Cities v. Usery,* 426 U.S. at 855. *See also Fry v. United States,* 421 U.S. 542, 547 n.1 (1975).

There can be no doubt that state legislative taxing decisions represent "traditional aspects of state sovereignty," *National League of Cities v. Usery,* 426 U.S. at 849, which are protected by the Tenth Amendment against federal encroachment. This Court gave explicit recognition to that principle in *Lane County v. Oregon,* 74 U.S. (7 Wall.) 71 (1869). In *Lane County,* this Court was asked to decide whether a federal law making United States notes lawful money for the payment of all debts, public and private, abrogated a state law that required counties to collect taxes and pay them to the state in gold and silver coin. This Court held that the passage of the federal law was not intended to, did not, and could not impair, alter, or affect the county's tax obligations to the state:

> . . . [T]he power of taxation . . . is an essential function of government. . . . The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which States commit the exercise of the power. . . . There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation.

Lane County v. Oregon, 74 U.S. at 76-77. *See also Thomson v. Union Pacific R.R.,* 76 U.S. (9 Wall.) 579, 591 (1870) ("the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered"). In short, "matters of State taxation are reserved to the States under the tenth amendment to the Constitution." *Snow v. Dixon,* 66 Ill. 2d 443, 464, 362 N.E.2d 1052, 1062 (1977).

Congressional interference with or alteration of the rules governing the imposition of the state franchise tax on

petitioners cannot be excused as an exercise of authority incident to the federal power over national banks. This is so for two obvious reasons. First, petitioners are not banks, and the federal power over national banks does not extend to the state taxation of persons other than banks:

> The Constitutional inhibition against taxing [national banks] does not abridge the taxing power of the several states in respect of other property. The implied exemption is a shield for federal agencies; not the source of Congressional power to control state action in respect of other matters.

Union Bank & Trust Co. v. Phelps, 288 U.S. 181, 187-88 (1933). *Accord, Davenport National Bank v. Board of Equalization,* 123 U.S. 83, 85 (1887). Second, even as to national banks Congress lacks power to mandate the imposition of state taxes. The federal power over national banks is merely one of "granting or withholding immunity of federal agencies from state taxation." *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 478 (1939). That power does not extend to the imposition of state taxes not affirmatively enacted by the state legislature.

The legislative power to determine the proper amount and objects of state taxation is perhaps the most important of those "functions essential to separate existence" that this Court has vigilantly safeguarded against federal encroachment. *See National League of Cities v. Usery,* 426 U.S. at 845; *Coyle v. Oklahoma,* 221 U.S. 559, 580 (1911); *Lane County v. Oregon,* 74 U.S. at 76. It follows that Pub. L. 91-156 cannot constitutionally be applied to mandate the imposition of state taxes that would not otherwise have been assessed under state law. *Cf. United States v. Best,* 573 F.2d 1095 (9th Cir. 1978) (federal government may not require state agency to suspend a driver's license). The decision below to the contrary is in error and should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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October 1979

APPENDIX

APPENDIX A

[268]

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,

v.

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET. AL.,

No. B-7896.

SUPREME COURT OF TEXAS.
JUNE 20, 1979.

REHEARING DENIED JULY 25, 1979.

[269]

McGEE, Justice.

This is a suit by certain taxpayers against the comptroller of public accounts to recover in excess of $2,000,000.00 in franchise taxes paid under protest.[1] The trial court denied relief, but the court of civil appeals reversed the lower court judgment, rendering judgment that the taxpayers recover all sums paid. 569 S.W.2d 584. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The basic facts of this case are undisputed and may be briefly summarized. Tax-

[270]

payers are eight national bank holding companies, which

[1] The plaintiffs and respondents in this suit are National Bancshares Corp. of Texas, Cullen/Frost Bankers, Inc., Southwest Bancshares, Inc., Texas American Bancshares, Inc., on its own behalf and as successor in interest to Southern National Corp., First City Bancorporation of Texas, Inc., First United Bancorporation, Inc., Mercantile Texas Corporation, as successor in interest to Federal Capital Corporation, Fort Sam Houston Bankshares, Inc. (by intervention), and Reidy International, Inc. (by intervention).

have derived income from national bank shares, and one ordinary business corporation, which has derived income from a national bank certificate of deposit. In April of 1974 the comptroller of public accounts issued a ruling which provided that dividends and interest paid on or after January 1, 1973 by a national bank located in this state are includable in the corporate payee's gross receipts for the purpose of assessing a franchise tax. The taxpayers paid the franchise tax under protest and subsequently brought this suit to recover sums paid.

The central issue presented is whether the comptroller correctly ruled that interest and dividends derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax. The taxpayers contend, and the court of civil appeals has held, that an act of the Texas legislature, 1971 Tex.Gen.Laws, ch. 292, art. 7 § 1, at 1206, codified as a footnote in Tex.Tax. — Gen.Ann. art. 20.02 (Vernon Supp.1978-1979) (hereinafter article 7, section 1), precludes such inclusion. We cannot agree. It is our opinion that the legislature merely intended to preclude the additional taxation of banks and did not intend to preclude a franchise tax upon other, unmentioned corporate entities.

Unless otherwise provided by law, a franchise tax is imposed upon all domestic and foreign corporations doing business in Texas. *See* Tex.Tax. — Gen.Ann. arts. 12.01 to 12.22 (Vernon 1969 & Supp.1978-1979). The granting of the privilege to transact business in this state confers economic benefits, including the opportunity to realize gross income and the right to invoke the protection of local law. The Texas franchise tax is a tax on the value of this privilege. *General Dynamics Corp. v. Bullock,* 547 S.W.2d 255, 257-58 (Tex.1976); *Texaco, Inc. v. Calvert,*

526 S.W.2d 630, 633 (Tex.Civ.App. — Austin 1975, writ ref'd n.r.e.); *see Ford Motor Co. v. Beauchamp,* 308 U.S. 331, 334-35, 60 S.Ct. 273, 84 L.Ed. 304 (1939) (holding Texas franchise tax constitutional).

The formula employed to compute a corporation's franchise tax is designed to achieve a tax commensurate with the value of the privilege granted. *General Dynamics Corp. v. Bullock, supra* at 257; *United North & South Development Co. v. Heath,* 78 S.W.2d 650, 652 (Tex.Civ. App. — Austin 1934, writ ref'd). This is accomplished by dividing the gross receipts from business done in Texas by the gross receipts from the entire business. The resulting allocation percentage is multiplied by the total taxable capital and, in turn, the product of this calculation (capital taxable by Texas) is multiplied by the current tax rate. The final product of this calculation is the sum of the corporation's franchise tax liability from business done in Texas.[2] Tex.Tax. — Gen.Ann. arts. 12.01 & 12.02 (Vernon 1969 & Supp.1978-1979); *see Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172, 173n. 1 (Tex.1967); *Texaco, Inc. v. Calvert, supra* at 632; Note, 5 Hous.L.Rev. 132, 133 (1967).

To determine what receipts from intangibles should be allocated to business done in this state, Texas employs the location of payor test. *Humble Oil & Refining Co. v. Calvert, supra* at 175. Under this test, the domicile of the debtor or payor in the case of interest or dividends is dispositive and not the domicile of the taxpaying corporate payee. If dividends or interest are received from a Texas corporation, they are Texas receipts. Conversely, if re-

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[2] $\frac{\text{Gross Receipts in Texas}}{\text{Gross Receipts of Entire Business}} = \text{Allocation Percentage} \times \text{Entire Taxable Capital} = \text{Capital Taxable By Texas} \times \text{Tax Rate} = \text{Franchise Tax}$

ceived from a foreign corporation, they are not Texas receipts. *Id.* at 175; Note, 5 Hous.L.Rev. 134 (1967).

Historically, the comptroller did not include dividends or interest income received

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from a national bank located in Texas in the corporate payee's Texas gross receipts. *See Silco, Inc. v. Calvert,* 482 S.W.2d 56, 59 (Tex.Civ.App. — Austin 1972, writ ref'd n.r.e.). This was because national banks, as opposed to state-chartered banks, were considered foreign corporations. Thus, under the location of payor test, income received from state-chartered banks was includable in Texas gross receipts, but income received from national banks was not equally includable. *Id.* at 58-59.

In April of 1974 the comptroller issued ruling 80-0.18 which is set forth in full in the margin.[3] This ruling essen-

[3] "General: The 'location of payor' test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

"State Banks: Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

"National Banks: Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 9.1-156, amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b)."

tially provides that effective January 1, 1973 income received from national banks located in Texas is taxable on the same basis as income received from state-chartered banks. The comptroller based this change in taxation policy on Pub.L. 91-156, 83 Stat. 434 (codified at 12 U.S.C. § 548 (Supp.1979)) (hereinafter Pub.L. 91-156), which became effective January 1, 1973.[4] That congressional enactment provided that for the purposes of any state tax law a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Applying the location of payor test, the comptroller concluded that dividends and interest received from national banks located in Texas constituted Texas gross receipts in the hands of the corporate payee.

The taxpayers in this case contend that the comptroller is precluded by an act of the Texas legislature from including income received from national banks located in this state in their Texas gross receipts. Article 7, section 1 provides:

> The passage of Public Law 91–156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the *institutions affected thereby* unless:
>
> (a) The tax or taxes were being imposed prior to January 1, 1971, or
>
> (b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act

[4] Pub.L. 91-156 provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Id.

> of the Legislature passed subsequent to the effective date of Public Law 91-156.

Id. (Emphasis added). The taxpayers reason that corporate payees of national bank dividends and interest — specifically, national bank holding companies and corporate holders of national bank certificates of deposit — are "institutions affected" by Pub.L. 91-156.

Before we undertake a determination of what institutions are affected by Pub.L. 91-156 within the meaning of article 7, section 1, we note that the present taxpayers' contention is tantamount to a claim for exemption from the franchise tax. Statutory exemptions from taxation are

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subject to strict construction since they are the antithesis of equality and uniformity and because they place a greater burden on other taxpaying businesses and individuals. *Hilltop Village, Inc. v. Kerrville Independent School District,* 426 S.W.2d 943, 948 (Tex.1968); *accord, Air Force Village Foundation v. Northside Independent School District,* 561 S.W.2d 905, 909 (Tex.Civ.App. — El Paso 1978, writ ref'd n.r.e.). An exemption cannot be raised by implication, but must affirmatively appear, and all doubts are resolved in favor of taxing authority and against the claimant. Simply stated, the burden of proof is on the claimant to clearly show that it comes within the statutory exemption. *Aransas Hospital, Inc. v. Aransas Pass Independent School District,* 521 S.W.2d 685, 689 (Tex.Civ.App. — Corpus Christi 1975, writ ref'd n.r.e.); *Space Precision Machining Co. v. State,* 503 S.W.2d 289, 291 (Tex.Civ.App. — Austin 1973, writ ref'd n.r.e.).[5]

[5] Professor Sands summarizes the rule thusly: As a general rule, grants of tax exemptions are given a strict interpretation against

We now turn to an examination of article 7, section 1. This statute states that there shall be no additional taxation of "institutions affected" by Pub.L. 91-156. Since an exemption from taxation must affirmatively appear and since there is no affirmative indication in article 7, section 1 of what corporations the term "institutions" was intended to encompass, we must refer to Pub.L. 91-156. The only "institutions" mentioned or referred to in that statute are "banks."

Although we adhere to the strict construction rules aforementioned, an examination of the history of Pub.L. 91-156 is helpful to an understanding of its intended effect. Behind the passage of this statute is the long-settled rule that the several states cannot tax national banks except as permitted by Congress. This limitation on the states' taxation power is founded on the theory that national banks are chartered by the United States government and that the federal power is supreme over its instrumentalities. *First Agricultural National Bank v. State Tax Commission,* 392 U.S. 339, 340, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1968); *see* Mitchie on Banks and Banking 348-49 n. 6 (1971). Historically, this meant that state-chartered banks were subject to some types of state taxation that national banks were exempt from. A good example of this disparity in tax treatment is provided

As explained in court opinions: "Exemptions from taxation claimed under legislative acts should be rigidly construed and established beyond a reasonable doubt. It is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear and unequivocal terms that a claim to an exemption can be maintained." "Taxation is the rule and exemption therefrom the exception; and the claimant of such an exemption must show his right thereto by evidence which leaves the question free from doubt. The claimant for an exemption must show that his demand is within the letter as well as the spirit of the law."

3 C. Sands, Statutes and Statutory Construction § 66.09, at 207 (1972 & Supp.1979).

by *Grayson County State Bank v. Calvert,* 357 S.W.2d 160 (Tex. Civ.App. — Austin 1962, writ ref'd n.r.e.). In that case it was held that a state franchise tax could constitutionally be levied against a state bank although the same tax could not be levied against a national bank located in this state. The court reasoned that national and state banks were not within the same class; rather, a national bank could transact business within state boundaries without the state's permission and without paying for the privilege. *Id.* at 162. A concurring justice noted this "inequitable condition" and called upon the Texas legislature to rectify the tax disadvantages under which state banks were forced to compete with national banks. *Id.* at 163. One year later the Texas legislature responded with an amendment to article 342-908 of the Texas Revised Civil Statutes. That article presently provides that state-chartered banks are subject only to such taxes that lawfully can be imposed by Texas on national banks located in the state.[6] In ef-

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fect, this means that both national and state banks are equally exempt from many forms of state taxation in Texas.

Although Texas achieved tax parity among state and national banks with this amendment, many other states had

[6] TexRev.Civ.Stat.Ann. art. 342-908 (Vernon 1973) provides:

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> State and national banks are hereby declared to be within the same class under the Constitution and laws of this state. It is not the intention of the Legislature to discriminate between state banks, national banks, and private banks. To the extent that the State of Texas has power to legislate with reference to national banks, all laws of this state shall apply alike to state banks, private banks, and national banks domiciled in this state; and state banks and private banks shall be subject to only such taxes heretofore or hereafter imposed by the state, or any political subdivision thereof, as could lawfully be imposed upon such state banks or private banks were they operating as national banks.

not totally or effectively remedied the disadvantageous tax position of their state-chartered banks.[7] The United States Congress accordingly reacted to this nationwide problem in 1969 with the passage of Pub.L. 91-156. The legislative history of that enactment reveals that the intended effect was to remove the prohibition against states "to levy modern types of taxes on national banks" to the same extent and in the same manner that they presently have the right to tax state-chartered banks. S.Rep.No.91-530, 91st Cong., 1st Sess., *reprinted* in [1969] U.S. Code Cong. & Admin. News, pp. 1599, 1599, 1594-98. The Congress concluded that there was no longer any justification for continuing to grant national banks immunities from state taxation that were not enjoyed by state-chartered banks.[8]

[7] *See* Note 8, *infra.*

[8] S.Rep.No. 91-530, 91st Cong. 1st Sess.; H.Rep.No. 91-728, 91st Cong., 1st Sess., reprinted in [1969] U.S. Code Cong. & Admin. News, p. 1595. The Senate Committee on Banking and Currency reported:

> Some States have exempted State banks from liability for any States taxes which national banks are required to pay. There, the State may or may not have attempted to achieve equality between banks and other businesses by taxing banks at a higher rate on the allowable taxes than other businesses pay. This type of device is at best uncertain.
>
> Regardless of the method employed by the particular State in an attempt to achieve equality, there is always a question of whether it has actually been achieved, be it equality between State and National banks, or equality between banks and other businesses.
>
> There may have at one time been justification for giving national banks privileges and immunities which were denied State banks, under the theory that national banks are peculiarly an instrumentality of the Federal Government, and, as such, hold a unique and distinct position from that of other institutions. *Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justi-*

Thus, the only institutions affected by Pub. L. 91-156 are "banks." Not one of the taxpayers in this case, however, can be characterized as a "bank."[9] A national bank holding company is a company which has control over a bank, but it is not chartered or statutorily empowered to transact banking business. 12 U.S.C.A. § 1841(a)(1) (1969 & Supp. 1979); P. Heller, Handbook of Federal Bank Holding Company Law 1-52 (1976). A corporate holder of a bank certificate of deposit is clearly not a bank, but merely a creditor of the bank. *Southview Corp. v. Kleberg First National Bank,* 512 S.W.2d 817, 819 (Tex.Civ.App. — Corpus Christi 1974, no writ); 10 Am.Jur.2d *Banks* § 455 (1963).

This strict, but literal, construction of the pertinent statutes leads to only one reasonable conclusion. By passage of article 7, section 1, our legislature sought to address

the congressional effort to remove federal barriers to equal tax treatment of state and national banks. Texas, unlike some other states, had previously equalized taxation among state and national banks and the legislature doubtlessly intended to maintain this parity by precluding any additional taxation of those institutions. Stated differently,

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fication for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks. Id. at 1595 (emphasis added); *see Lake County National Bank v. Kosydar,* 305 N.E.2d 799, 802 (Ohio 1973); Mitchie on Banks and Banking 350 n. 11 (1971 & Supp.1979) (purpose of Pub.L. 91-156 is to remove immunity from state taxation).

[9] A "bank" may be defined as an "*institution* organized under the laws of the United States . . . the District of Columbia, [or] any territory of the United States . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C.A. § 1841 (c) (1969 & Supp.1979) (emphasis added).

there is no reason for us to presume that the legislature sought to exempt national bank holding companies and corporate holders of national bank certificates of deposit from a franchise tax computed on income received from national banks located in this state.

Moreover, an exemption from taxation cannot be extended to a taxpayer merely because it is related to or connected with a tax-exempt corporation. In *Silco, Inc. v. Calvert,* 482 S.W.2d 56 (Tex.Civ.App. — Austin 1972, writ ref'd n.r.e.), the court was faced with a contention similar to the one advanced by the national bank holding companies in this case. The taxpayer, Silco, Inc., was a holding company comprised of four tax-exempt corporations, including one state bank and one state savings and loan. The comptroller assessed a franchise tax against Silco which was computed on the interest and dividends which Silco had received from its four subsidiary corporations. Silco filed suit to recover the tax paid, contending that its corporate components were exempt from franchise taxation and that logic and equity dictated that such extensions should be extended to Silco itself. The trial court held for the Comptroller and the court of civil appeals affirmed. The court stated that Silco was connected with its tax-exempt components through ownership, but held that the parent corporation and its components were separate legal entities. Silco could not bring itself within the exemption statute by the mere fact that its capital was invested in the stock or securities of a corporation exempted from the tax. *Id.* at 58. Likewise, we do not believe that national bank holding companies are entitled to an exemption merely because the legislature has continued the franchise tax exemption for the national banks.

We therefore hold that the comptroller correctly ruled that, under the location of payor rule, interest and dividends

derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax. To hold otherwise would mean that the Texas legislature intended to continue the unequal treatment between recipients of income from state banks and recipients of income from national banks. This we cannot accept. Rather, we believe that the legislature merely intended to preserve the status quo in reference to taxation of banks, both national and state, until it chose to impose additional taxation at a later time.

The judgment of the court of civil appeals is accordingly reversed and the judgment of the trial court is affirmed.

APPENDIX B

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NATIONAL BANCSHARES CORPORATION
OF TEXAS, ET. AL.,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS, ET AL.,

No. 12750.

COURT OF CIVIL APPEALS OF TEXAS, AUSTIN.
JULY 12, 1978.
REHEARING DENIED AUG. 9, 1978.

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O'QUINN, Justice.

Eight bank holding companies brought this lawsuit in September of 1974 to recover in excess of $2,000,000.00 in franchise taxes paid under protest to the Comptroller of Public Accounts. Subsequently, in January of 1976, one additional bank holding company intervened, and in March of 1976 an ordinary business corporation, holder of certificates of deposit of national banking associations situated in Texas, also intervened to be allied with plaintiffs. In addition to the Comptroller, the Attorney General and the State Treasurer were made parties defendant as required by statute.

The principal issue to be decided is whether the State may treat dividends and

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interest flowing from a stock held in national banks as part of the holding corporation's "gross receipts from business done in Texas" for purposes of ascertaining the franchise tax. Challenged by plaintiffs below, who are

appellants, and to be tested for validity, is Comptroller's Ruling 80-0.18 (1974), which on its face claims authority for such treatment under provisions of revised 12 U.S.C. Sec. 548 (1969, effective 1973), also known as Public Law 91-156. This suit also involves interpretation of an amendment, codified under Article 20.02, V.A.C.S., Taxation-General (1971), by which Act the Legislature of Texas undertook to control the effects of the federal statute (12 U.S.C. Sec. 548) on the Texas tax system.

To place the main issue of this cause in proper focus, it is appropriate to review the statutory, administrative, and case law developments established prior to the Comptroller's Ruling of 1974, which rested upon the Act of Congress, and together spawned the controversy leading to this litigation.

Every domestic and foreign corporation, chartered or authorized to do business in Texas or doing business in Texas, must pay a Texas franchise tax pursuant to requirements of Article 12.01, V.A.T.S., Tax.-Gen. Each corporation liable for payment of a franchise tax must determine, in compliance with Article 12.02(1)(a), "... the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which *the gross receipts from its business done in Texas* bear to the total gross receipts of the corporation from its entire business." (Emphasis added)

The same basic franchise tax allocation formula in Article 12.02 was used in Article 7084, V.A.T.S., the source of the present statute. Article 7084 did not designate the receipts which were to be included as the corporation's "business done in Texas," and to supply certainty, in curing the omission, administrators of the Texas franchise tax adopted the "location of payor test" in allocating

receipts from intangibles to a corporation's "business done in Texas." Only receipts from intangibles paid by a payor located in Texas were considered under this test to be a part of the corporate taxpayer's business done in Texas.

Thus receipts from intangibles paid to a corporation by an out-of-state payor were not treated as within the meaning of "business done in Texas" and were not included in applying the formula. Although it was recognized by the Supreme Court of Texas that such administrative policy was not obligatory, the Court nevertheless in 1967 held that the doctrine was of such long standing it should not be changed or departed from "in the absence of clear statutory authorization." *Humble Oil & Refining Co. v. Calbert*, 414 S.W.2d 172, 180 (Tex.Sup.1967).

A large portion of the gross receipts from business activities of the taxpayers in this lawsuit consists of dividends and interest received from national banks in which the several taxpayers own stock. National banks are not Texas corporations but are created under the National Bank Act (12 U.S.C. Sec. 21 et seq.) which constitutes "... by itself a complete system for the establishment and government of national banks." *Deitrick v. Greaney*, 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1940).

Prior to the dispute in this lawsuit, the Comptroller excluded dividends and interest, flowing from stock held in national banks, from a taxpayer's "gross receipts from its business done in Texas." In this case the Comptroller insists that even prior to this controversy the Comptroller could have treated national banks as domestic corporations if the Comptroller had chosen to do so. In apparent support of this contention, the Comptroller makes the singular argument that heretofore there was some "doubt" respecting the "domicile" of a national bank, and claims that the Comptroller resolved any doubt regarding the location of

the payor national bank in favor of a status as a non-Texas corporation.

The provision of 12 U.S.C. Sec. 548 (P.L. 91-156), enacted by Congress in 1969 and effective in 1973, upon which the Comptroller rests the Ruling of 1974, is in this language:

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> "For the purpose of *any tax law enacted under authority of* the United States *or any State*, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." (Emphasis added)

The Comptroller contends that any doubt regarding location of payor which the Comptroller entertained prior to 1973 was removed automatically by the Congressional Act because "An ancillary effect of the statute was to eliminate prior uncertainties as to the domicile of national banks."

Prior to its amendment by the 91st Congress in 1969, 12 U.S.C. Sec. 548 provided a list of taxes which could be imposed on national banks by state legislatures. The permissible levies named were the only taxes which could be imposed by a state on any national bank. The statute was designed explicitly to restrict the power of state legislatures in levy of taxes on national banks. See 2 U.S.Code Cong. & Admin.News (1969), p. 1594.

The restrictions imposed under 12 U.S.C. Sec. 548 prior to amendment were not applicable of course to state taxation of state banks and thereby created an inequality between state and national banks. As early as 1943, the Legislature of Texas moved to remedy this inequality with enactment of Article 342-908, V.A.T.S, by which Texas voluntarily restricted its authority to tax state banks except in the same manner it imposed taxes on national banks.

The language of the statute, amended in 1963 and again in 1965, embodies the basic purpose and effect of the law as originally passed in 1943:

> "State and national banks are hereby declared to be within the *same class* under the Constitution and laws of this state. *It is not the intention of the Legislature to discriminate between state banks, national banks, and private banks.* To the extent that the State of Texas has power to legislate with reference to national banks, all laws of this state shall apply alike to state banks, private banks, *and national banks domiciled in this state*; and state banks and private banks shall be subject to only such taxes heretofore or hereafter imposed by the state, or any political subdivision thereof, as could lawfully be imposed upon such state banks or private banks were they operating as national banks." (Emphasis added)

Revised 12 U.S.C. Sec. 548, although enacted by Congress in 1969, was not made effective until 1973. In that interim the Legislature of Texas reacted to revision of the federal statute by enacting, among various amendments of tax statutes, Article 7 of that Act, which expressly foreclosed "any additional tax or taxes upon the institutions affected thereby" Public Law 91-156 (12 U.S.C. Sec. 548).

Article 7 in its full text provided:

> "Section 1. The passage of Public Law 91–156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby unless:
>
> (a) The tax or taxes were being imposed prior to January 1, 1971, or
>
> (b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act of the Legislature passed subsequent to the effective date of Public Law 91–156." (Acts 1971, 62nd

Leg., p. 1193, 1206, ch. 292, Art. 7, eff. July 1, 1971; see also Note V.A.T.S. Tax.-Gen., art. 20.02).

Nearly three years later, the Comptroller, in April of 1974, published Ruling 80-0.18, the essential parts of which are set out:

"*General*: The 'location of payor' test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

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"*State Banks*: Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

"*National Banks*: Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91–156 amended Section 5219 of the Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b)."

In reliance on the Ruling of 1974, the Comptroller assessed additional franchise taxes against appellant

taxpayers in the amount of $1,022,803.77 for 1974 and $1,087,731.43 for 1975. Appellants paid the taxes for 1974 under protest and within ninety days thereafter brought this action for refund, and again in 1975 the taxes were paid under protest and appellants amended their pleadings to include the taxes paid for both 1974 and 1975.

The cause was tried before the court without a jury, and the court entered judgment on June 27, 1977, that plaintiffs below take nothing by their suit. The district court's judgment was based on the court's conclusion that as a matter of law appellants were not "institutions affected by the passage of Public Law 91-156 within the meaning of" Article 7 of the Legislative Act of 1971 (Note, Article 20.02, V.A.T.S., Tax.-Gen.).

We will reverse the judgment of the trial court and will render judgment that appellant taxpayers recover the taxes assessed pursuant to Ruling 80-0.18 and paid under protest.

In addition to the conclusion of law already noted, the trial court found the following facts:

(1) Franchise Tax Ruling 80-0.18, which held that dividends and interest from national banks with principal offices in Texas were "gross receipts from its business done in Texas," was promulgated as a *direct result* of the enactment of Public Law 91-156.

(2) The publication of Ruling 80-0.18 was the first formal pronouncement of the Comptroller's policy with respect *to the effect of Public Law 91-156 on the Texas franchise tax* treatment of dividends and interest from national banks.

(3) Acts 1971, 62nd Legislature, p. 1206, ch. 292, art. 7, Sec. 1, codified as a footnote to Article 20.02,

V.A.T.S., Tax.-Gen., was adopted by the Legislature in 1971.

(4) The rule set forth in Ruling 80-0.18 increased the amount of franchise taxes payable by the taxpayers.

(5) Such increase was not being imposed prior to 1971.

(6) The taxpayers in this suit have not been specifically designated as being subject to such increase by any act of the Legislature passed after the effective date of 12 U.S.C. Sec. 548.

(7) Prior to the effective date of revised 12 U.S.C. Sec. 548, corporations receiving interest or dividends from Texas national banks were not required to include the same in their "gross receipts from its business done in Texas" for franchise tax purposes.

Appellants bring two points of error. *First,* appellants contend the trial court erred in concluding that the taxpayers are not "institutions affected" by passage of Public Law 91-156 and therefore not entitled to relief or protection purportedly provided by Article 7 of the Legislative Act of 1971, now annotated as a footnote to Article 20.02, V.A.T.S., Tax.-Gen. *Second,* appellants urge error because the trial court concluded that Public Law 91-156 automatically imposed, or permitted, without State

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legislation, an additional tax on appellants. In essence this claim is that revision of 12 U.S.C. Sec. 548 dealt with equal taxation of state and national banks, and that since the revised statute was not concerned with taxation of corporations owning stock in national banks, the Comptroller was

without authority to use the federal statute as authority for publishing Ruling 80-0.18.

The State defends the trial court's judgment principally on three grounds: (1) that the corporate taxpayers are not "institutions" within the meaning of Article 7 of the Act of 1971 (Art. 20.02, footnote); (2) that appellants are not "affected" by revision of 12 U.S.C. Sec. 548 within the meaning of Article 7; and (3) that the substantially increased franchise tax, resulting from Ruling 80-0.18, is not an "imposition of additional taxes" within the meaning of Article 7.

The State further contends that construction of Article 7 of the Act of 1971, as urged by appellants, would lead to an "unjust result in that it would cause inequality of taxation among banks, bank holding companies and corporations generally." This contention obviously is based on the Comptroller's view that the purpose and effect of revised 12 U.S.C. Sec. 548 is to change the preexisting franchise tax structure for corporations owning stock in national banks.

In view of this contention, we deem it more orderly to consider first the purpose of revised 12 U.S.C. Sec. 548, at issue under appellants' second point of error, and thereafter consider the import of Article 7, in the Legislative Act of 1971, at issue under the first point.

The theory of the State, that revised 12 U.S.C. Sec. 548 authorizes the Comptroller to change the State's policy on the inclusion of dividends and interest in the stockholder's "gross receipts from its business done in Texas," is equivocal and wanting in consistency. The legislative history of revised 12 U.S.C. Sec. 548 shows that the specific purpose of the revision was ". . . to provide authorization for the *States . . . to levy modern types of taxes on national banks*

. . ." (Emphasis added) See 2 U.S.Code Cong. & Admin. News (1969), p. 1599. The Congress believed there was ". . . no longer any justification for . . . continuing to grant *national banks* immunities from State taxation which are not afforded State banks . . ." (Emphasis added) 2 U.S. Code Cong. & Admin.News (1969), p. 1595.

In this suit the State insists that an "ancillary" and "automatic" effect of the revision was to alter the taxation of corporations owning national bank stock, but the contention is without support or a showing that such policy was of concern to the drafters of the revision or that such a change is mandated by the federal statute.

To the contrary, it appears that because Article 342-908, set out earlier, declares state and national banks equal for purposes of state taxation of the banks, revised 12 U.S.C. Sec. 548 does not abrogate the State's taxation scheme, but merely removes restrictions on state taxation of national banks, thereby enlarging taxation *permissible* for both state and national banks. As observed earlier, the specific purpose of revised 12 U.S.C. Sec. 548 was to provide authorization for the states to levy modern types of taxes on banks which were not authorized under the statute before its amendment.

Prior to revision, 12 U.S.C. Sec. 548 restricted only state taxation of national banks. The statute did not prohibit state taxation of dividends and interest flowing from stock in national banks to corporations owning such stock. The Legislature of Texas voluntarily excluded this income of corporations from "gross receipts from its business done in Texas" under the doctrine of "location of payor rule," since national banks were and are created under federal law, not state law.

It does not follow that 12 U.S.C. Sec. 548, when revised to remove restrictions on state taxation of national banks,

also altered a long established procedure in Texas which had been in no manner controlled by the restrictions of the statute prior to its revi-

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sion. As revised, the federal statute simply allows the states to treat national banks as state banks for purpose of equal taxation of banks. The concept thus provided is for equal taxation of banks and is unrelated to taxation of dividends and interest from national bank stock in the hands of corporate stockholders.

It is also apparent that exclusion of national bank stock dividends and interest from "gross receipts from its business done in Texas" by the taxpayers does not conflict with the stated purpose of the revised federal statute, and therefore no change is mandated by the revision. The ends of 12 U.S.C. Sec. 548 are not defeated by allowing a state to treat national banks as non-Texas corporations, for purposes of computing the stockholders' franchise tax, because there is no resulting inequality in the tax treatment of banks themselves. In fact, this procedure, of treating national banks as non-Texas corporations for purposes of the stockholders' franchise tax, has existed harmoniously in Texas for forty-five years with this State's system of equality for state and national banks. The Legislature made clear its intention in Article 342-908 (1943) *not* to "discriminate between state banks, national banks, and private banks."

This harmonious coexistence demonstrates that the principle of treating national banks as non-Texas corporations, for purposes of the stockholders' franchise tax, results in no discrimination between state and national banks and does not cause "inequality of taxation among banks," as urged by the Comptroller. The Comptroller's present position on this question is out of harmony with past perform-

ance. In the more than forty years since the Legislature declared state and national banks equal for purposes of state taxation of banks, the Comptroller has at no time challenged the exclusion of dividends and interest on national bank stock from the stockholders' "gross receipts from its business done in Texas" on the ground that the practice created an inequality between state and national banks. The Comptroller before this Court in 1972 urged the identical proposition now advanced by the appellants and was successful in *Silco, Inc. v. Calvert,* 482 S.W.2d 56, 59 (Tex.Civ.App. Austin 1972, writ ref'd n.r.e.). In that case this Court held: "This statute (Article 342-908) requires only that state and national *banks* be treated equally under the state laws. The statute does not in any way require an equal treatment of any other corporations that are not state banks or national banks." (Emphasis added)

In the present case the trial court found that Ruling 80-0.18 was promulgated as a direct result of revised 12 U.S.C. Sec. 548. The federal statute becomes the Comptroller's only authority to support his attempt to alter the established franchise tax system, and the argument seems to be that the amended statute removed "doubt" as to "domicile" of national banks. Yet Article 342-908 made it clear that there has been no question of "domicile" simply by mandating equal treatment of state banks, private banks, and "national banks *domiciled* in this state." (Emphasis added) The question of domicile had been determined long ago without violence to compatibility of the two concepts under examination in this case. The Comptroller is committed to his own contention in *Silco, supra,* when interpreting the impact of a federal statute precisely of the same nature as Article 342-908.

The State's essential complaint appears reduced to deploring "inequality of taxation among bank holding com-

panies and corporations generally." Since this matter of inequality presents no conflict with the revised federal statute, the Comptroller's challenge goes to the inherent inequality of the "location of payor test" itself. The Supreme Court placed that challenge beyond authority of the Comptroller in *Humble Oil & Refining Co. v. Calvert, supra,* and held there that the "location of payor test" may be changed only by action of the Legislature. (414 S.W.2d 180, col. 2)

We turn now to consideration of the Legislature's action in 1971 to forestall the levy of additional taxes on institutions affected by passage of Public Law 91-156.

[591]

We conclude that even if the Comptroller should be correct in the contention that the federal statute as revised had as its purpose the cure of unequal franchise tax treatment of corporations owning stock in national banks, and we have held that the statute had no such purpose, nevertheless the State may not prevail in this lawsuit. The Legislature in 1971 prohibited precisely the type of change the Comptroller took to make in the tax structure acting under authority claimed to be derived from 12 U.S.C. Sec. 548.

The Legislature, being aware of the revision by Congress of 12 U.S.C.A. Sec. 548, acted without delay, in fact two years before the federal statute would become operative, to anticipate changes in the State's tax system, which might be improvidently undertaken because of the federal statute, and enacted laws to prevent changes not first considered and approved by the Legislature. The legislative intent could hardly be expressed more clearly or more forcefully than in the text reading, "The passage of Public Law 91 — 156 (12 U.S.C.A. Sec. 548) by the Congress of the United States *shall not operate to impose or permit the imposition*

of any *additional* tax or taxes upon the *institutions affected* thereby . . ." (Emphasis added)

It is the State's position that the Act of 1971 (Article 7) does not apply to bank holding companies and other corporations owning stock in national banks, and in its attempt to sustain this position the State reveals a basic flaw in the argument that the revised federal statute gives the Comptroller authority to change the established corporate franchise tax structure. The State argues that one of the purposes of the federal law was to cure unequal treatment of corporations owning stock in national banks. The State insists that such treatment is not in keeping with the spirit of 12 U.S.C.A. Sec. 548, and that an "ancillary effect" of the statute was to correct this inequality. Further, the State claims, the greatly increased franchise tax, achieved by Ruling 80-0.18, is an "automatic effect" of the federal law and therefore the federal statute is authority for the administrative Ruling.

The State continues with the argument that the corporations owning stock in national banks are *not* "institutions affected" by the federal statute within the meaning of the Act of 1971 (Article 7) because the federal amendment was adopted by Congress to cure unequal treatment of *banks* and therefore *banks* are the only "institutions affected."

Thus it is clear that the Comptroller attempted to use a federal statute as authority for increasing the franchise tax payable by these appellants by more than one million dollars annually and yet claim that the federal law does not "affect" these institutions. The finding of the trial court that Ruling 80-0.18 was promulgated as a *direct result* of revised 12 U.S.C. Sec. 548, and the further finding that the Ruling was the formal pronouncement of the Comptroller's policy, with respect to the *effect* of the federal law on the Texas franchise tax, make inescapable the conclusion that

the Comptroller acted on belief that 12 U.S.C. Sec. 548 *permits the imposition* of increased taxes and that the federal law in fact "affected" appellant corporations in the ordinary dictionary sense. Appellants were *affected* when the *effect* produced was "the imposition of any additional tax or taxes" upon them, actually, in this case, at the annual rate of more than one million dollars.

It appears that the only remaining question is whether the required inclusion of dividends and interest in the stockholders' "gross receipts from its business done in Texas," resulting in substantially increased taxes, constitutes "the imposition of any additional tax or taxes" within the meaning of Article 7. We hold that inclusion of the dividends and interest, resulting in significant increases in the franchise tax of appellants, amounted to "imposition of . . . additional . . . taxes," in contravention of the prohibition the Legislature enacted in Article 7 of the Act of 1971. *Yoakum Industries, Inc. v. Calvert,* 414 S.W.2d 171 (Tex.Sup.1967); *Calvert v. Electro-Sci-*

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ience Investors, Inc., 509 S.W.2d 700 (Tex.Civ.App. Austin 1974, no writ).

Upon the holdings and reasoning stated, we reach the conclusion that the Comptroller acted without authority and in contravention of an explicit Act of the Legislature in promulgating and enforcing Ruling 80-0.18 to increase the franchise taxes of appellant corporations owning stock in national banks, and that the additional taxes collected ought to be refunded to the taxpayers.

The judgment of the trial court is reversed, and judgment is rendered that appellant taxpayers recover the taxes paid under protest as shown by the record in this cause.

SHANNON, J., not participating.

APPENDIX C

NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.
v.
BOB BULLOCK, ET AL.
IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

Findings of Fact and Conclusion of Law

Findings of Fact

1. The stipulations of the parties filed herein are adopted and found as fact by the Court and incorporated herein by reference.

2. Franchise Tax Ruling 80–0.18, which held that dividends and interest from national banks with principal offices in Texas were "gross receipts from business done in Texas," was promulgated as a direct result of the enactment of Public Law 91–156.

3. The publication of Franchise Tax Ruling 80–0.18 on April 18, 1974, was the first formal pronouncement of the Comptroller of Public Accounts' policy with respect to the effect of Public Law 91–156 on the Texas franchise tax treatment of dividends and interest from national banks with principal offices in Texas.

4. Acts 1971, 62nd Legislature, p. 1206, ch. 292, art. 7, § 1, codified as a footnote to article 20.02, TEX. TAX.-GEN. (House Bill 730), was adopted by the Legislature of the State of Texas in 1971, to be effective July 1, 1971.

5. The rule set forth in Franchise Tax Ruling 80–0.18 increased the amount of Texas franchise taxes payable by Plaintiffs and Intervenors.

6. Such increase was not being imposed prior to January 1, 1971.

7. Plaintiffs and Intervenors have not been specifically designated as being subject to such increase by any act of the Legislature passed subsequent to January 1, 1973, the eventual effective date of Public Law 90–156.

8. Prior to January 1, 1973, corporations receiving interest or dividends from Texas national banks were not required to include the same in its "gross receipts from business done in Texas" for franchise tax purposes.

9. Plaintiffs and Intervenors were subject to and paid the Texas franchise tax prior to January 1973, and have been subject to and paid the Texas franchise tax since January 1, 1973, except Intervenor Reidy which has been subject to and paid such tax since January 1, 1974.

Conclusion of Law

Plaintiffs and Intervenors were not institutions affected by the passage by Public Law 91–156 within the meaning of art. 7 of House Bill 730.

SIGNED THIS 2nd day of December, 1977.

HERMAN JONES
Judge Presiding

APPENDIX D

JUDGMENT

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.
v.
NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.
FROM TRAVIS COUNTY, THIRD DISTRICT

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals which reversed the judgment of the trial court and rendered judgment that the taxpayers recover all sums. Therefore, it is adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the trial court which found for petitioners, Bob Bullock, Comptroller of Public Accounts of the State of Texas et al., be, and hereby is, affirmed in accordance with the opinion of this Court herein this day delivered.

It is further ordered that respondents, National Bancshares Corporation of Texas et al., and their surety, The Aetna Casualty and Surety Company, pay all costs expended and incurred in this Court and the Court of Civil Appeals and that petitioners, Bob Bullock, Comptroller of Public Accounts of the State of Texas et al., have and recover of and from respondents, National Bancshares Corporation of Texas et al., and their surety, The Aetna Casualty and Surety Company, all costs by them expended and incurred in said courts and that a copy of this judgment be certified to the District Court of Travis County, Texas for observance.

(Opinion of the Court by Justice McGee)

APPENDIX E

IN THE

Supreme Court of Texas

No. B-7896

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; WARREN G. HARDING, STATE TREASURER OF THE STATE OF TEXAS; and JOHN L. HILL, JR., ATTORNEY GENERAL OF THE STATE OF TEXAS,

Petitioners,

v.

NATIONAL BANCSHARES CORPORATION OF TEXAS; CULLEN/FROST BANKERS, INC.; SOUTHWEST BANCSHARES, INC.; TEXAS AMERICAN BANCSHARES, INC., on its own behalf and as successor in interest to Southern National Corporation; FIRST CITY BANCORPORATION OF TEXAS, INC.; FIRST UNITED BANCORPORATION, INC.; MERCANTILE TEXAS CORPORATION, as successor in interest to Federated Capital Corporation; FORT SAM HOUSTON BANKSHARES, INC. by intervention; and REIDY INTERNATIONAL, INC. by intervention,

Respondents.

RESPONDENTS — BANK HOLDING COMPANIES' MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

NOW COME Respondents National Bancshares Corporation of Texas, Cullen/Frost Bankers, Inc., Southwest Bancshares, Inc., Texas American Bancshares, Inc., on its own behalf and as successor in interest to Southern National Corporation, First City Bancorporation of Texas, Inc., First United Bancorporation, Inc., Mercantile Texas Corporation, as successor in interest to Federated Capital

Corporation, and Fort Sam Houston Bankshares, Inc. by intervention (referred to herein as "Respondents" or "Taxpayers") and file this their Motion for Rehearing of this Honorable Court's action in reversing the Court of Civil Appeals' judgment and as grounds for such motion would respectfully show as follows:

1. Public Law 91-156 Does Not and Constitutionally Could Not Authorize the Comptroller's Action in Ruling 80-0.18.

This Court decided without discussion or question that the federal Congress can mandate a change in well-established Texas tax policy towards state-chartered bank holding companies and thereby usurp the power of taxation reserved to the Texas Legislature under the United States Constitution. Because of the critical importance of this question, Respondents are filing this motion for rehearing.

A succinct summary of the litigation is necessary. The Trial Court found as a fact that Ruling 80-0.18 was promulgated as a direct result of the enactment of Public Law 91-156 and that Ruling 80-0.18 was the first formal pronouncement of the Comptroller's policy with respect to the effect of Public Law 91-156 on the Texas franchise tax treatment of dividends and interest from national banks [Findings of Fact Nos. 2 and 3, Supp. Tr. 2-3].[1] Based upon these findings, the Court of Civil Appeals correctly observed that the validity of Ruling 80-0.18 must rest upon whether Public Law 91-156 provides sufficient legal basis for the change in law promulgated by the ruling. 569 S.W.2d 584,

[1] The critical importance of Public Law 91-156 to Ruling 80-0.18 cannot be questioned. National banks are not and cannot be Texas corporations *in fact*. They are chartered by the federal government under the National Bank Act (12 U.S.C. Sec. 21 et seq.). They can be treated as Texas corporations for purposes of the location-of-payor rule *only if* the rule of Public Law 91-156 (a rule derived solely for the purpose of taxing *banks*) is to be extended to the computation of the Texas franchise tax of holding companies. *See* 569 S.W.2d at 591.

589 (Tex.Civ.App. — Austin 1978, writ granted). Further, since the purpose and intent of Public Law 91-156 was confined to taxation of national banks, it was not a proper basis for changing the mode of Texas franchise taxation of bank holding companies and other corporations receiving income from national banks. 569 S.W.2d at 589-90. This alone was a sufficient basis upon which to reverse the Trial Court and to render judgment for Respondents. The Court of Civil Appeals, however, went further and held *in the alternative* that Ruling 80-0.18 was prohibited by article 7, section 1 of House Bill 730.

This Court's opinion is directed entirely to the second and alternative holding of the Court of Civil Appeals. The opinion completely ignores the first and primary holding of the Court of Civil Appeals and assumes without discussion that Public Law 91-156 authorized the Comptroller to issue the Ruling. Yet this Court agrees with both of the basic premises of the Court of Civil Appeals by recognizing that the "comptroller based this change in taxation policy on [Public Law 91-156]" and that "the only 'institutions' mentioned or referred to in [Public Law 91-156] are 'banks.'" Slip Opinion at 4 and 6. Further, this Court emphasized that Public Law 91-156 was intended to operate only with regard to tax treatment of banks. Slip Opinion at 6-9.

Holding that Public Law 91-156 applies only to banks is manifestly inconsistent with holding that Public Law 91-156 mandates a change in the long-established Texas policy regarding taxation of bank holding companies. By so holding, this Court is trapped by the same circularity of reasoning that the Court of Civil Appeals found fatal to the Comptroller's position:

> Thus it is clear that the Comptroller attempted to use a federal statute as authority for increasing the fran-

> chise tax payable by these appellants by more than one million dollars annually and yet claim that the federal law does not "affect" these institutions.

569 S.W.2d at 591.

By implicitly holding that Public Law 91-156 mandates the change in the method of taxation of state-chartered bank holding companies, this Court has allowed the federal Congress to preempt longstanding Texas tax policy toward these institutions without the concurrence of the Texas Legislature. This is not something that the federal Congress intended, because, as this Court has correctly noted, the Congress intended to deal only with the taxation of national banks in Public Law 91-156. Slip Opinion at 6-9.

Furthermore, even if Congress had intended to change Texas tax policy regarding state-chartered bank holding companies, *it is clear that it could not constitutionally do so*. While Congress can prohibit or limit state taxation under the Commerce Clause or require equal taxation of federal institutions such as banks, it cannot affirmatively impose state taxation on non-federal institutions such as state-chartered bank holding companies. For Congress to direct an official of the State of Texas to impose a state tax usurps the power of taxation reserved to the state legislatures by the federal Constitution. *See* U.S. CONST. amend. X; *Lane County v. Oregon,* 74 U.S. 71 (1869), cited with approval in *National League of Cities v. Usery,* 426 U.S. 833, 844 (1976). *See also* Respondent's Answer to Application for Writ of Error at 7-10 and Respondent's Post-Submission Brief at 6-7.

This Court has held previously that the longstanding location-of-payor rule of the Texas franchise tax cannot be changed without action by the Texas Legislature. *Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967).

Ruling 80-0.18 unquestionably changes the substance of this rule as it applies to Texas bank holding companies by treating dividends and interest received from non-Texas corporations (*e.g.,* national banks) as "gross receipts from business done in Texas." In permitting this, the Court's holding approves a change in the rule by the unilateral action of the Comptroller based upon a change in federal law having nothing to do with the taxation of bank holding companies and without any action by the Texas Legislature. This holding constitutes a significant and unprecedented erosion of the constitutionally-mandated prerogative of the Texas Legislature over Texas tax policy.

Carried to its logical conclusion, this Court could as well hold that the State of Delaware, for example, could pass a law that any corporation incorporated in Delaware should be treated as a corporation organized and existing under the laws of the state within which its principal office is located, and such law would require the Texas Comptroller to treat all Delaware subsidiaries with principal offices in Texas as Texas corporations under the location-of-payor rule. Obviously, such a result would be absurd. *Only the Texas Legislature, and not Delaware nor the federal Congress,* can make the decision to treat non-Texas corporations as Texas corporations. Thus, it is clear that Public Law 91–156 did not have the effect of transforming national bank corporations into Texas corporations under the location-of-payor rule. Both before and after the passage of Public Law 91–156, a national bank is a national corporation chartered by the federal Congress, just as a Delaware subsidiary of a Texas corporation is a Delaware corporation chartered by the State of Delaware. Neither is a Texas payor under the location-of-payor rule.

Respondents respectfully urge the Court to re-examine its holding in light of the compelling logic of the Court of

Civil Appeals' primary holding that Public Law 91–156 would not operate to change franchise taxation in Texas without affirmative action by the Texas Legislature. Such a decision would prevent the inadvertant and unconstitutional result of a federal statute dealing solely with banks significantly altering Texas tax policy toward state-chartered bank holding companies without the concurrence of the Texas Legislature.

Since this is an independent ground for relief, it can be followed without altering this Court's analysis of House Bill 730. In fact, the Court of Civil Appeals' analysis of Public Law 91–156 is the only analysis that is logically consistent with this Court's analysis of House Bill 730.

2. House Bill 730 Precludes Imposition of the Disputed Tax.

If upon re-examination, this Court finds that Public Law 91–156 did change the Texas policy regarding franchise taxation of bank holding companies, then the Court must re-examine its opinion that bank holding companies are not "institutions affected" by Public Law 91–156 in order to avoid the circularity of reasoning noted by the Court of Civil Appeals. If Public Law 91–156 changed the taxation of bank holding companies, then it is inescapable that they have been "affected" by Public Law 91–156. In such circumstances, House Bill 730 requires clear affirmative action by the Texas Legislature before that effect can take place. *See Chase Manhattan Bank, N.A.* v. *Finance Administration of the City of New York,* 47 U.S.L.W. 3585 (March 6, 1979), *reversing* 372 N.E.2d 789 (N.Y. 1977).[2]

There has been no such action by the Texas Legislature.

[2] In *Chase Manhattan* the Supreme Court invalidated a New York commercial rent tax on national banks because it had not been applied to national banks by affirmative action of the New York legislature after Public Law 91-156. The case turned on construction of the federal savings clause which is almost identical to House Bill 730. *See* Respondents Answer to Application for Writ of Error at 18.

3. Taxpayers Do Not Seek an Exemption from Taxation.

The Court's opinion states that Respondents' position is "tantamount to a claim for exemption from the franchise tax." Slip Opinion at 6. That is simply not correct. Respondents are and have always been subject to Texas franchise tax and they do not seek to change that here. Rather, they seek only to maintain the status quo of that taxation as it existed prior to January 1, 1973, the effective date of Public Law 91–156. That prior treatment was sanctioned by the Texas Legislature. *Humble Oil & Refining Co.* v. *Calvert,* 414 S.W.2d 172 (Tex. 1967). *See also Silco, Inc.* v. *Calvert,* 482 S.W.2d 56 (Tex. Civ. App. — Austin 1972, writ ref'd n.r.e.). The Texas Legislature has not changed that treatment. The only thing that has changed is the enactment of federal Public Law 91–156, a statute having absolutely nothing to do with Texas franchise taxation of bank holding companies.

Thus Respondents seek only the continued application of the general rules prior to the change in federal law. It is instead the State which must argue for a departure from established tax policy, and it must do so *solely* on the basis of an edict of the federal Congress.

PRAYER

For the foregoing reasons, Respondents — Bank Holding Companies respectfully move this Court to withdraw its opinion in this case and upon rehearing to issue an opinion affirming the judgment of the Court of Civil Appeals.

Respectfully submitted,

C. W. Wellen
Thomas J. Brorby
R. Richard Coston
William Lee

Marvin K. Collie
Harry M. Reasoner
Thomas P. Marinis, Jr.
Ann Lents

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Attorneys for Respondents — Bank Holding Companies

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents — Bank Holding Companies' Motion for Rehearing were served upon counsel for Defendants by delivering copies to Mr. Gilbert Bernal, Assistant Attorney General of Texas, Office of the Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711 and upon counsel for Respondent Reidy International, Inc. by delivering copies to Mr. Willis Witt, 500 Gulf Building, Houston, Texas 77002 by messenger on this the 5th day of July, 1979.

/s/ .....

APPENDIX F

CLERK'S OFFICE — SUPREME COURT

Austin, Texas, July 25, 1979

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of BULLOCK ET AL. v. NATIONAL BANCSHARES ET AL., No. B-7896 was this day overruled.

Very truly yours,
GARSON R. JACKSON, Clerk

APPENDIX G

IN THE

District Court

OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 223,714

NATIONAL BANCSHARES CORPORATION OF TEXAS; FROSTBANK CORPORATION; SOUTHWEST BANCSHARES, INC.; TEXAS AMERICAN BANCSHARES, INC.; FIRST CITY BANCORPORATION OF TEXAS, INC.; FIRST UNITED BANCORPORATION, INC.; SOUTHERN NATIONAL CORPORATION; FEDERATED CAPITAL CORPORATION,

Plaintiffs,

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; JESSE JAMES, STATE TREASURER OF THE STATE OF TEXAS; AND JOHN L. HILL, JR., ATTORNEY GENERAL OF THE STATE OF TEXAS,

Defendants.

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

Plaintiffs, National Bancshares Corporation of Texas; FrostBank Corporation; Southwest Bancshares, Inc.; Texas American Bancshares, Inc.; First City Bancorporation of Texas, Inc.; First United Bancorporation, Inc.; Southern National Corporation, Federated Capital Corporation (hereinafter referred to as "Plaintiffs") complain of Bob Bullock, successor in office to Robert S. Calvert as Comptroller of Public Accounts of the State of Texas, Jesse James, in his capacity as Treasurer of the State of Texas, and John L. Hill, Jr., in his capacity as Attorney General of the State of Texas, Defendants, and file this,

their amended joint petition, and for cause of action allege as follows:

I.

Plaintiff National Bancshares Corporation of Texas is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in San Antonio, Texas. Its address is 430 Solidad Street, San Antonio, Texas 78291.

II.

Plaintiff FrostBank Corporation is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in San Antonio, Texas. Its address is P.O. Box 1600, San Antonio, Texas 78296.

III.

Plaintiff Southwest Bancshares, Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and place of business in Houston, Texas. Its address is P.O. Box 2629, Houston, Texas 77001.

IV.

Plaintiff Texas American Bancshares Inc. (formerly The Fort Worth National Corporation) is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in Fort Worth, Texas. Its address is P.O. Box 2050, Fort Worth, Texas 76101.

V.

Plaintiff First City Bancorporation of Texas, Inc. is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of

business in Houston, Texas. Its address is 1001 Main Street, Houston, Texas 77002.

VI.

Plaintiff First United Bancorporation, Inc. is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in Fort Worth, Texas. Its address is 500 West 7th Street, Fort Worth, Texas 76102.

VII.

Plaintiff Southern National Corporation is a corporation duly organized and existing under the laws of the State of Texas, with its principal office and place of business in Houston, Texas. Its address is P.O. Box 2529, Houston, Texas 77001.

VIII.

Plaintiff Federated Capital Corporation (formerly Capital National Corporation) is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office and place of business in Houston, Texas. Its address is P.O. Box 500, Houston, Texas 77001.

IX.

Defendants, Bob Bullock, Jesse James, and John L. Hill, Jr., are, respectively, Comptroller of Public Accounts, Treasurer, and Attorney General of the State of Texas. Defendants are sued in their respective capacities in accordance with the provisions of Article 1.05, Tex.Tax-Gen. (Ch. 1, Title 122A, Rev. Civ. Stat. 1925, as amended). Each resides in Austin, Travis County, Texas, where service of citation may be had on him.

X.

This suit is brought pursuant to Article 1.05, Tex.Tax.-Gen., to recover franchise taxes for the franchise tax period from May 1, 1974 to April 30, 1975 and for the franchise tax period from May 1, 1975 to April 30, 1976. For the period May 1, 1974 to April 30, 1975, Plaintiffs seek to recover $1,022,803.07, which were timely paid by Plaintiffs pursuant to written protests accompanying said payments as required by Article 1.05(1), Tex.Tax.-Gen., as follows:

National Bancshares Corporation of Texas	$ 41,753.16
FrostBank Corporation	38,530.50
Southwest Bancshares, Inc.	141,061.75
Texas American Bancshares, Inc.	47,502.25
First City Bancorporation of Texas, Inc.	448,081.75
First United Bancorporation, Inc.	76,852.75
Southern National Corporation	11,280.66
Federated Capital Corporation	217,740.25
	$1,022,803.07

for the period May 1, 1975 to April 30, 1976, Plaintiffs (except Plaintiff Southern National Corporation) seek to recover $1,027,731.34, which were timely paid by Plaintiffs (except Plaintiff Southern National Corporation) pursuant to written protests accompanying said payments as required by Article 1.05(1), Tex.Tax.-Gen., as follows:

National Bancshares Corporation of Texas	$ 45,781.00
FrostBank Corporation	54,251.25
Southwest Bancshares, Inc.	112,387.00
Texas American Bancshares, Inc.	28,160.50
First City Bancorporation of Texas, Inc.	519,799.59
First United Bancorporation, Inc.	63,856.25
Federated Capital Corporation	263,495.75
	$1,087,731.34

Plaintiffs' original petition sought recovery of $1,022,403.07 in taxes for the franchise tax period May 1, 1974 to April 30, 1975. This amended petition is being filed to add the $1,087,731.34 in taxes for the franchise tax period May 1, 1975 to April 30, 1976, as contemplated by Article 1.05(3), Tex. Tax.-Gen.

In addition, this suit shall cover all additional taxes that may be paid under protest during the pendency of this suit or any appeal thereof as provided in Article 1.05(3), Tex. Tax.-Gen. This Court has jurisdiction over this suit by virtue of Article 1.05(2), Tex. Tax.-Gen. Plaintiffs have joined in this suit pursuant to Tex.R.Civ.P. 40 in that all claims arise out of the same occurrence and contain common questions of fact and law.

XI.

Ninety (90) days did not elapse between payment of the aforementioned franchise taxes for the period May 1, 1974 to April 30, 1975, with the accompanying protests and the filing of this suit by Plaintiffs seeking recovery of said payments on September 9, 1974; thirty (30) days have not elapsed between payment of the aforementioned franchise taxes for the period May 1, 1975 to April 30, 1976 with the accompanying protests and the filing of this amended petition by Plaintiffs seeking recovery of said payments.

XII.

Plaintiffs are bank holding companies under the Bank Holding Company Act of 1956, as amended. During the accounting period indicated on each Plaintiff's 1974 and 1975 franchise tax reports Plaintiffs received dividends and interests from national banks whose principal offices were located within the State of Texas.

XIII.

Under Article 12.02, Tex. Tax.-Gen., each corporation subject to franchise tax shall "determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business."

XIV.

Prior to April 18, 1974, Defendant Comptroller of Public Accounts' predecessor in office did not consider dividends and interest received from national banks with principal offices in Texas to be includible in gross receipts from business done in Texas. However, on that date Defendant Comptroller of Public Accounts' predecessor in office published Franchise Tax Ruling No. 80-0.18 requiring inclusion of such dividends interest paid on or after January 1, 1973, in "gross receipts from business done in Texas" for purposes of computing Texas franchise tax pursuant to Article 12.01, Tex. Tax.-Gen.

XV.

Plaintiffs had no reasonable statutory alternative but to comply with Franchise Tax Ruling No. 80-0.18 and accordingly included dividends and interest received from national banks whose principal offices were located in Texas as gross receipts from business done in Texas in the computation of their 1974 and 1975 Texas franchise tax. Such inclusion resulted in Plaintiffs' franchise tax being greater than it would have been without such inclusion by the amounts set forth in Paragraph X. As required Article 1.05(1), Tex. Tax.-Gen. Plaintiffs paid the addi-

tional taxes for the period May 1, 1974 to April 30, 1975 under protest to Defendant Comptroller of Public Accounts' predecessor in office. Defendant Comptroller of Public Accounts' predecessor in office acknowledged receipt of such payments by letters. As required by Articles 1.05(1) and 1.05(3), Tex. Tax.-Gen. Plaintiffs (except Plaintiff Southern National Corporation) paid additional taxes for the period May 1, 1975 to April 30, 1976 under protest to the Defendant Comptroller of Public Accounts. Defendant Comptroller of Public Accounts acknowledged receipt of such payments by letters. The protest letters transmitting Plaintiffs' payments disclosed fully the grounds of protest, but the Defendants have refused to refund such payments or any portion thereof.

XVI.

Defendants are not lawfully entitled to demand, collect or retain the protested payments because Revised Civil Statutes of Texas, Acts 1971, 62 Leg. P. 1206, Ch. 292, Art. 7, § 1 ("House Bill 730") exempts Plaintiffs from such additional taxation in that Plaintiffs are all "institutions affected" by the passage of Public Law 91-156 (12 U.S.C. § 548) by the Congress of the United States and thereby entitled to the protection from additional taxation afforded by House Bill 730.

XVII.

Alternatively and cumulatively, Defendants are not lawfully entitled to demand, collect or retain the protested payments because Franchise Tax Ruling No. 80-0.18 is based on the erroneous assumption that the amendment of section 5219, Revised Statutes (12 U.S.C. § 548) by Public 91-156 permits taxation by state and local authorities of organizations other than national banks.

XVIII.

By virtue of such unlawful collection of franchise tax, Defendants and the State of Texas became and are now indebted to Plaintiffs in the following amounts plus interest:

Plaintiff	Additional Tax
National Bancshares Corporation of Texas	$ 87,534.16
FrostBank Corporation	92,781.75
Southwest Bancshares, Inc.	253,448.75
Texas American Bancshares Inc.	75,662.75
First City Bancorporation of Texas, Inc.	967,881.34
First United Bancorporation, Inc.	140,709.00
Southern National Corporation	11,280.66
Federated Capital Corporation	481,236.00
	$2,110,534.41

WHEREFORE, Plaintiffs pray that the Defendants be cited to appear and answer herein, and that upon final trial and hearing hereof, Plaintiffs receive judgment for the amounts set forth in Paragraph XVIII hereof plus interest, for cost, that Franchise Tax Ruling No. 80-0.18 be declared null and void, and for such other further relief, general and special, at law and equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this 5th day of September, 1975, a true and correct copy of Plaintiffs' First Amended Petition was served on The Honorable John L. Hill, Jr., Attorney General of Texas, and Rick Harrison, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, Attorneys for Defendants, by forwarding a copy of said Petition to them by certified mail, return receipt requested.

/s/ .....
R. RICHARD COSTON

APPENDIX H

IN THE

District Court

OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 223,714

NATIONAL BANCSHARES CORPORATION OF TEXAS; FROSTBANK CORPORATION; SOUTHWEST BANCSHARES, INC.; TEXAS AMERICAN BANCSHARES, INC.; FIRST CITY BANCORPORATION OF TEXAS, INC.; FIRST UNITED BANCORPORATION, INC.; SOUTHERN NATIONAL CORPORATION; FEDERATED CAPITAL CORPORATION; and FORT SAM HOUSTON BANKSHARES, INC.,

Plaintiffs,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS; JESSE JAMES, STATE TREASURER OF THE STATE OF TEXAS; and JOHN L. HILL, JR., ATTORNEY GENERAL OF THE STATE OF TEXAS,

Defendants.

PLAINTIFFS' MOTION FOR A NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME National Bancshares Corporation of Texas; Frostbank Corporation; Southwest Bancshares, Inc.; Texas American Bancshares, Inc.; First City Bancorporation of Texas, Inc.; First United Bancorporation, Inc.; Southern National Corporation; Federated Capital Corpo-

ration; and, by intervention, Fort Sam Houston Bankshares, Inc., Plaintiffs in the above entitled and numbered cause [hereinafter "Plaintiffs"], and file this their Motion for New Trial and request that this Court set aside its judgment heretofore entered into the above cause on June 27, 1977, rendering judgment against Plaintiffs and to grant a new trial in the cause for the following good and sufficient grounds:

I.

The Trial Court erred in concluding that the passage of Public Law 91-156 (83 Stat. 434) by the United States Congress permits the imposition of additional Texas franchise taxes on Plaintiffs by the Comptroller of Public Accounts through adoption of an administrative ruling.

II.

The Trial Court erred in concluding that Plaintiffs are not "institutions affected" by the passage of Public Law 91-156 (83 Stat. 434) who are entitled to the relief provided by Acts 1971, 62nd Leg. of Texas, p. 1206, ch. 292, Art. 7, § 1, codified as a footnote in Art. 20.02, Tex. Tax.-Gen. ("House Bill 730").

III.

The Trial Court erred in concluding that Plaintiffs are not public or financial institutions, or part of the banking system, which are entitled to the protection of House Bill 730 even under a narrow construction of that statute.

IV.

The Trial Court erred in concluding that the Comptroller of Public Accounts' Ruling 80-0.18 did not impose an "addi-

tional tax" on Plaintiffs within the meaning of House Bill 730.

V.

The Trial Court erred in construing House Bill 730 other than in accordance with the plain meaning of the words contained in such statute.

VI.

The Trial Court erred because:

A. There is no probative evidence to support its ruling.

B. In the alternative, there is insufficient evidence to support its ruling.

C. In the alternative, the ruling is so contrary to the great weight and the preponderance of the evidence as to be clearly wrong.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that, upon hearing, this Court sustain Plaintiffs' Motion for New Trial in all things and that this Court grant a new trial and hearing upon the matters before this Court. Plaintiffs respectfully reserve the right to amend this Motion for New Trial pursuant to the Texas Rules of Civil Procedure.

Respectfully submitted,

/s/ .....
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CERTIFICATE OF SERVICE

Copies of the foregoing Motion for New Trial were served upon counsel for Defendants and counsel for Intervenor Reidy Internaitonal Inc. by placing copies in the United States mail addressed to Mr. Rick Harrison, Special Assistant Attorney General, Office of the Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711 and W. Robert Brown, 510 Gulf Building, Houston, Texas 77002, respectively.

/s/ .....
THOMAS P. MARINIS, JR.

APPENDIX I

EXCERPT FROM PETITIONERS' ANSWER TO APPLICATION FOR WRIT OF ERROR IN THE SUPREME COURT OF TEXAS

[7]

ARGUMENT

I. Public Law 91-156 Does Not Authorize the Promulgation of Ruling 80-0.18 (In Reply to Petitioners' Specific Point 3)

The Trial Court found that Ruling 80-0.18 was promulgated as a direct result of the enactment of Public Law 91-156 and that the ruling was the first formal pronouncement of the Comptroller's policy with respect to the effect of Public Law 91-156 on the Texas franchise tax treatment of dividends and interest from national banks [Findings of Fact Nos. 2 and 3, Supp. Tr. 2-3]. Based upon these findings, the Court of Civil Appeals properly concluded that the validity of Ruling 80-0.18 must rest upon whether Public Law 91-156 provides sufficient legal basis for the change in law promulgated by the ruling (Slip Opinion at 8). Addressing this question, the Court of Civil Appeals held that since the purpose and intent of Public Law 91-156 was confined to taxation of national banks, it could not be used as a basis for

[8]

changing the mode of Texas franchise taxation of bank holding companies and other corporations receiving income from national banks (Slip Opinion at 9-10).

The State complains of this holding, arguing in effect that Public Law 91-156 directed a change in the "state of incorporation" of national banks for purposes of the franchise taxation of bank holding companies and other

corporations and that Ruling 80-0.18 merely applies the established "location-of-payor" test in light of that federal directive. The State characterizes the refusal of the Court of Civil Appeals to approve this construction as violating the Supremacy Clause of the United States Constitution (Article VI, Section 2). Further, the State argues that the Court of Civil Appeals' holding results in the unequal treatment of state and national banks in contravention of Public Law 91-156, article 342-908, Tex. Rev. Civ. Stat. Ann., and Article VIII, Section 1 of the Texas Constitution. None of these arguments withstand examination.[5]

The Supremacy Clause.

In order for a decision of a state court or act of a state legislature to violate the Supremacy Clause of the United States Constitution there must first be a federal mandate pertaining to the same subject matter with which that act or decision conflicts. That federal mandate is not present here, with good reason.

For Congress to direct an official of the State of Texas to impose a state tax would have usurped the power of taxation reserved to the states by the federal Constitution.

[5] At several places in its application the State refers to the testimoney of Thomas P. Marinis, Jr., one of Respondents' counsel, before the Legislature in 1973 implying, among other things, that Respondents had conceded the automatic effect of Public Law 91-156 on the status of national bank dividends and interest. Mr. Marinis was testifying in the context of the Comptroller's assertion of the effect of Public Law 91-156. For example, for months the Comptroller had been stating that he intended to impose such additional tax when Public Law 91-156 became effective (S.F. at 6-10). Mr. Marinis specifically stated that the matter might become the subject of litigation and predicted that Respondents would prevail in such litigation (Joint Ex. 2, at 9). The entire purpose of Mr. Marinis' appearance before the Legislature was to inform it of a problem and to attempt to persuade it to a legislative solution to avoid the necessity of the protracted litigation that is now before the Court. That appearance would not have been necessary had the Comptroller followed House Bill 730.

See U.S. Const. amend. X; *Lane County v. Oregon,* 74 U.S. 71 (1869). The rationale of the *Lane County*

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case is strikingly similar to that of this case. In *Lane County,* the law of Oregon required its counties to collect and pay taxes to the state in gold and silver coin. The United States Congress passed a federal law which provided that United States notes shall also be "lawful money, and legal tender in payment of debts, public and private, within the United States." 74 U.S. at 78. The County of Lane attempted to pay its taxes in United States notes, contending (as the Comptroller does here) that the passage of such federal law had the automatic effect of changing the internal tax structure of the state by requiring it to accept United States notes in lieu of gold or silver coin in payment of taxes. In holding that the passage of this federal law could not, and was not intended to, affect the tax laws of Oregon, the Supreme Court clearly set forth the law reserving to a state the power of internal taxation:

> The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. . . . There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation.

74 U.S. at 77. The *Lane County* decision was recently cited and approved in *National League of Cities v. Usery,* 426 U.S. 833, 844 (1976), in which the Supreme Court held that Congress did not have the power to impose minimum wage and maximum hour provisions on state employees. In *National League of Cities,* the Supreme Court "recognized that there are attributes of sovereignty attaching to every

state government which may not be impaired by Congress . . . because the Constitution prohibits it from exercising the authority in that manner." 426 U.S. at 845. These activities include "those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851. Taxation is clearly one of these functions. *Lane County v. Oregon, supra* at 76.

In view of these authorities the United States Congress cannot constitutionally infringe in any way upon Texas' power of taxation by altering the Texas franchise tax treatment of bank holding companies and other corporations receiving income from national banks.

However, even assuming for the sake of argument that Congress had the power to preempt the Texas "location-of-payor" rule with

[10]

respect to national bank dividends and interest, it will not be presumed to have done so "unless that was the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That "clear and manifest purpose" is lacking here, because it clearly was not the intention of Congress in passing Public Law 91-156 to require the State of Texas to impose additional franchise taxes on bank holding companies or other corporations. Public Law 91-156 does not direct the State of Texas to do anything regarding taxation of bank holding companies. Rather, as the Court of Civil Appeals specifically noted, the sole purpose and intent of Public Law 91-156 was to free states from any limitations on the taxation of national banks and permit the states "to levy modern types of taxes on national banks" while at the same time preserving their equality with state banks. *See* 2 U.S. CODE CONG. & AD. NEWS 1599 (1969). The federal statute is permissive only; Congress specifically stated that it was "firmly committing to the several States' responsibility for their own tax policies." CONFERENCE REPORT No. 91-728, STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE, 2 U.S. CODE CONG. & AD. NEWS 1602 (1969). To insure this result, Congress enacted a savings provision which prohibited the state taxing authorities from imposing any additional taxes (except certain enumerated taxes not relevant here) without affirmative action by the state legislatures until January 1, 1973. *Id.* at 1602-03. *See also* REPORT OF THE SENATE BANKING AND CURRENCY COMMITTEE, 2 U.S. CODE CONG. & AD. NEWS 1597 (1969).

There is simply no support for the State's position that Congress intended to effect different policies in section 1(a) and section 2(a) of Public Law 91-156. Section 1(a) was the temporary amendment effective on enactment in 1969, while section 2(a) was the permanent amendment effective January 1, 1973. The Congressional policy involved in the two approaches is the same. Further, the State's claim that section 2(a) is "clearly applying to any tax, not just taxes imposed on banks" (State's Application at 19) is blatantly inconsistent with its assertion that "Public Law 91-156 affected only banks, and Respondents are not banks" (State's Assignment of Error No. 1).

* * *

APPENDIX J
EXCERPT FROM PETITIONERS' POST-SUBMISSION BRIEF IN THE SUPREME COURT OF TEXAS

[6]

III. P.L. 91-156 Does Not and Could Not Constitutionally Require the Imposition of These Additional Taxes.

The State argues that under P.L. 91-156 and the federal Supremacy Clause the State of Texas is required to change the application of its location-of-payor rule with regard to Respondents. As we discussed in Part II of this brief, the short answer is that if P.L. 91-156 was intended to effectuate such a change, then H.B. 730 precludes it from doing so.

Further, examination of P.L. 91-156 reveals that Congress had no such intention and under the federal Constitution could not have properly affirmatively mandated the imposition of a tax by the State of Texas.

The legislative history of P.L. 91-156 makes clear that it was Congress' intention to leave the question of the law's effect on state tax policy to the states. Thus, the Senate Committee Report stated:

> The Committee is in full accord with the principle that every state government should be allowed the greatest possible degree of autonomy with regard to the formulation of its tax structure.

REPORT OF THE SENATE BANKING AND CURRENCY COMMITTEE, 2 U.S. CODE CONG. & ADMIN. NEWS at 1595 (1969).

In the context of this legislative history, the State's Supremacy Clause argument is entirely spurious. P.L. 91-156 does not direct the State of Texas to do anything regarding taxation of bank holding companies under the location-of-payor rule. P.L. 91-156 simply does not speak to the question of how shareholders of banks or recipients

of interest from banks will be treated under the location-of-payor rule. There is no conflict between taxing national and state *banks* identically pursuant to P.L. 91-156 and taxing *shareholders* of national and state banks differently as settled state law requires.[8]

[7]

This should settle the issue. If, however, P.L. 91-156 is deemed to speak to the taxation of shareholders of banks, then H.B. 730 precludes its application. The State's lawyers cannot logically deny the Legislature's power to preclude such effect since they concede that H.B. 730 precludes the application of P.L. 91-156 to banks. If the federal Supremacy Clause does not prevent H.B. 730 from precluding the application of P.L. 91-156 to banks, it certainly cannot prevent H.B. 730 from precluding the law's application to Respondents.

In fact, the State has never seriously questioned H.B. 730's efficacy in general or the Legislature's ability to countermand the Public Law's effect. It cannot do so, because Congress simply does not have the power to impose Texas taxes. While Congress can tell a state the limits of its ability to tax, it cannot affirmatively tell a state to impose a tax. U.S. CONST. amend. X; *Lane County v. Oregon,* 74 U.S. 71 (1869). *See also National League of Cities v. Usery,* 426 U.S. 833, 844 (1976).

* * *

[8] In response to Justice Pope's inquiry, under the Texas location-of-payor rule as it has existed for over half a century, a national bank is not "organized under the laws of Texas." The Texas Banking Code expressly recognizes that a national bank is a creature of federal, not state, law. It defines a national bank as "[a]ny bank corporation organized under the provisions of Title 12, United States Code, § 21 (U.S. Rev. Statutes, § 5133, and the amendments thereto)". TEX. REV. CIV. STAT. ANN. art. 342-102 (1977). To be organized under the laws of the State of Texas a corporation must obtain a charter from the Secretary of State. Clearly the national banks in which Respondents own shares have not been reincorporated in Texas. No federal statute can change Texas law to make them Texas corporations for purposes of the Texas location-of-payor rule.

APPENDIX K

PUBLIC LAW 91-156
(12 U.S.C. § 548)
AN ACT

To clarify the liability of national banks for certain taxes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

§ 1. Temporary amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdiction on a nondiscriminatory basis:

"(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

"(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

"(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

"(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

"(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

"(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

"(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam."

(b) The amendment made by subsection (a) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.

§ 2. Permanent amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended to read:

"SEC. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

(b) The amendment made by subsection (a) becomes effective on January 1, 1972.

§ 3. Saving provision

(a) Except as provided in subsection (b) of this section, *prior to January 1, 1972,* no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto.

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

§ 4. Study by Board of Governors of the Federal Reserve System

(a) The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall make a study to determine the probable impact on the banking systems and other economic effects of the changes in existing law to be made by section 2 of this Act governing income taxes, intangible property taxes, so-called doing business

taxes, and any other similar taxes which are or may be imposed on banks. In conducting the study the Board shall consult with the Secretary of the Treasury and appropriate State banking and taxing authorities.

(b) The Board shall make a report of the results of its study to the Congress not later than December 31, 1970. The report shall include the Board's recommendations as to what additional Federal legislation, if any, may be needed to reconcile the promotion of the economic efficiency of the banking systems of the Nation with the achievement of effectiveness and local autonomy in meeting the fiscal needs of the States and their political subdivisions.

[The effective date of section 2 of P.L. 91-156 was subsequently extended to January 1, 1973 by Joint Resolution of Congress on December 22, 1971. The reason for such extension was that the Board of Governors of the Federal Reserve System had not completed the study required in section 4.]

APPENDIX L

COMPTROLLER'S RULING NO. 80-0.18

DIVIDENDS AND INTEREST

References:

Section 5219 of the Revised Statutes (12 U.S.C. 548); Article 12.02(1)(b), Chapter 12, Title 122A, Revised Civil Statutes of Texas; Acts 1971, 62nd Leg., p. 1206, Ch. 292, Art. 7, #1; Silco v. Calvert, 482 S.W.2d 56; Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172.

1. General.

The "location of payor" test is used in determining whether dividends and interest are attributable as receipts from business done in Texas under Article 12.02(1)(b). In accordance therewith, dividends and interest paid by a domestic corporation are includable in gross receipts from business done in Texas, whereas dividends and interest paid by a foreign corporation do not constitute Texas gross receipts under the statute.

2. State Banks.

Dividends and interest paid by a bank organized under the Banking Code of Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

3. National Banks.

Prior to January 1, 1973, national banks were considered to be foreign corporations for franchise tax purposes and, consequently, dividends and interest paid by a national bank located in Texas were not attributable as Texas gross receipts. Public Law 91-156 amended Section 5219 of the

Revised Statutes to provide, effective January 1, 1973, that for the purposes of any tax law enacted under the authority of any state a national bank shall be treated as a bank organized and existing under the laws of the state within which its principal office is located. Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b).

NOS. 79-652 and 79-653

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

REIDY INTERNATIONAL, INC., AND NATIONAL BANCSHARES CORPORATION OF TEXAS, ET AL.,
Petitioners,

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Respondents.

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court, U.S.
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NOV 23 1979
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1971 Tex. Gen. Laws, ch. 292, art. 7, §1, at 1206, codified as footnote in Tex. Tax.-Gen. Ann. art. 20.02 (Article 7 of House Bill 730) 3-6, 13-15
Articles 12.01, et seq., Tax.-Gen., Title 122A, V.T.C.S. 2
Article 12.02(1)(a), Tax.-Gen., Title 122A, V.T.C.S. 2, 3
Article 12.02(1)(b), Tax.-Gen., Title 122A, V.T.C.S. 3
Article 12.19(3), Tax.-Gen., Title 122A, V.T.C.S. 2, 12
Article 14.015(4)(5), Tax.-Gen., Title 122A, V.T.C.S. 2, 12
Article 14.11(A), Tax.-Gen., Title 122A, V.T.C.S. 2, 12
Article 14.11(C)(1)(2), Tax.-Gen., Title 122A, V.T.C.S. 2, 12
Article 14.12, Tax.-Gen., Title 122A, V.T.C.S. 2, 12

ADMINISTRATIVE RULING

Texas Comptroller of Public Accounts Ruling 80-0.18 (1974) 3

NOS. 79-652 and 79-653

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

REIDY INTERNATIONAL, INC.,
AND NATIONAL BANCSHARES
CORPORATION OF TEXAS, ET AL.,
Petitioners,

V.

BOB BULLOCK, COMPTROLLER
OF PUBLIC ACCOUNTS OF THE
STATE OF TEXAS, ET AL.,
Respondents.

* * *

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

* * *

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Bob Bullock, Comptroller of Public Accounts, Warren G. Harding, successor in office to Jesse James as Treasurer of Texas and Mark White, successor in office to John L. Hill, Jr., as Attorney General of Texas, respectfully submit the following brief in opposition to the issuance of writs of certiorari as prayed for by Petitioners.

QUESTION PRESENTED

Whether the Supreme Court of Texas correctly interpreted Public Law 91-156 (12 U.S.C. §548), in view of the Tenth Amendment of the United States Constitution, so as to treat national banks principally

located in Texas as Texas payors under the "location of payor" rule of the Texas Franchise Tax Act.

STATUTES INVOLVED

12 U.S.C. §42 provides: "The provisions of all Acts of Congress relating to national banks shall apply in the several states, the District of Columbia, the several Territories and possessions of the United States, and the Commonwealth of Puerto Rico."

Petitioners adequately set forth the provisions of other statutes involved herein in Appendix E to Reidy International, Inc.'s petition and Appendix K to Bank Holding Companies' petition.

Article 12.19(3), Tax.-Gen., Title 122A, V.T.C.S. (Reproduced as Appendix A).

Articles 14.015(4)(5), 14.11(A), 14.11(C)(1)(2), and 14.12, Tax.-Gen., Title 122A, V.T.C.S. (Reproduced as Appendix B).

STATEMENT OF THE CASE

Petitioners, bank holding companies and an oil and gas corporation (Reidy International, Inc.) sued Respondents for refund of franchise taxes for the years 1974 and 1975 which were imposed under the Texas Franchise Tax Act, Articles 12.01, et seq., Tax.-Gen., Title 122A, V.T.C.S., and calculated as described in Petitioner Reidy's Petition for Writ of Certiorari (page 3, fn. 1). To determine whether the dividends or interest paid by national banks to Petitioners constituted Petitioners' "gross receipts from business done in Texas" under the allocation formula of Art. 12.02(1)(a), the "location of payor" rule as described in *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967), was used.

Prior to January 1, 1973, dividends and interest paid

by national banks to corporations were treated as gross receipts from the "entire business" of a corporation under Art. 12.02(1)(a), i.e. they appeared in the denominator of the allocation formula of Art. 12.02(1)(a) because such banks were considered foreign corporations or non-Texas payors since they were chartered under the National Bank Act, 12 U.S.C. §21.

Congress enacted 12 U.S.C. §548 (hereinafter referred to as Public Law 91-156) which became effective January 1, 1973. Respondent Comptroller of Public Accounts applied this Congressional enactment to the Texas Franchise Tax statutes. Public Law 91-156 provides:

> For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

Using P. L. 91-156, Texas statutes and franchise tax case law as authorities, Respondent Comptroller of Public Accounts promulgated Ruling 80-0.18 (reproduced as Pet. Bank Holding Companies' App. L). This ruling treats national banks as Texas payors under the State's "location of payor" rule, and "...Accordingly, dividends and interest paid on and after January 1, 1973 by a national bank whose principal office is located within Texas are includable in gross receipts from business done in Texas pursuant to Article 12.02(1)(b)." (Pet. Bank Holding Companies' App. L). As a result, Petitioners' franchise taxes increased in amount for the years at issue.

After Congress adopted Public Law 91-156, the Texas Legislature responded by passing the 1971 omnibus tax bill, Texas Laws 1971, ch. 292, at 1194-1207, hereinafter more specifically referred to as Article 7 of House Bill 730. Article 7 provides:

> The passage of Public Law 91-156 by the Congress of the United States shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby unless:
>
> (a) The tax or taxes were being imposed prior to January 1, 1971, or
>
> (b) Such institutions are specifically designated as being subject to such additional tax or taxes other than the limited sales and use tax by an Act of the Legislature passed subsequent to the effective date of Public Law 91-156.

Interpreting the provisions of Art. 7 of H.B. 730, the District Court concluded as a matter of law that Petitioners "were not institutions affected by the passage by Public Law 91-156 *within the meaning of art. 7 of House Bill 730.*" (Emphasis added). (Pet. Reidy's App. A, A-2). The Court of Civil Appeals reversed the District Court. It based its decision upon the following reasons: (a) The Texas Legislature in 1971 prohibited precisely the type of change the Comptroller made acting under authority claimed to be derived from 12 U.S.C. Sec. 548 (Pet. Reidy's App. B, B-13); (b) Petitioners were institutions affected by Public Law 91-156 (Pet. Reidy's App. B, B-14, B-15); and (c) the increase in franchise taxes was "the imposition of any additional tax or taxes within the meaning of Article 7." (Pet. Reidy's App. B, B-15).

The Texas Supreme Court reversed the Court of Civil Appeals and viewed Petitioners' claims as essentially a matter of State law, stating:

> The central issue presented is whether the comptroller correctly ruled that interest and dividends derived from national banks located

> in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise tax. The taxpayers contend, and the court of civil appeals has held, that an act of the Texas Legislature, 1971 Tex. Gen. Laws, ch. 292, art. 7 §1, at 1206, codified as a footnote in TEX.TAX.GEN.ANN. art. 20.02 (Vernon Supp. 1978-1979) (hereinafter article 7, section 1), precludes such inclusion. We cannot agree. It is our opinion that the legislature merely intended to preclude the additional taxation of banks and did not intend to preclude a franchise tax upon other, unmentioned corporate entities.

(Pet. Reidy's App. C, C-2). The Texas Supreme Court noted that Petitioners were claiming an exemption under Art. 7 from the taxes at issue and construed such statute strictly against Petitioners. (Pet. Reidy's App. C, C-6). The Texas Supreme Court then noted that, "the only institutions affected by Pub. L. 91-156 are 'banks,'" and that none of Petitioners are banks. (Pet. Reidy's App. C, C-9, C-10). The Texas Supreme Court observed also that, "By passage of article 7, section 1, our legislature sought to address the congressional effort to remove federal barriers to equal tax treatment of state and national banks... Stated differently, there is no reason for us to presume that the legislature sought to exempt national bank holding companies and corporate holders of national bank certificates of deposit from a franchise tax computed on income received from national banks located in this state." (Pet. Reidy's App. C, C-10). The Texas Supreme Court thus concluded:

> We therefore hold that the comptroller correctly ruled that, *under the location of payor rule*, interest and dividends derived from national banks located in this state are includable in the corporate payee's Texas gross receipts for the purpose of assessing a franchise

> tax. To hold otherwise would mean that the Texas legislature intended to continue the unequal treatment between recipients of income from state banks and recipients of income from national banks. This we cannot accept. *Rather, we believe that the legislature merely intended to preserve the status quo in reference to taxation of banks, both national and state, until it chose to impose additional taxation at a later time.* (Emphasis added).

(Pet. Reidy's App. C, C-11).

As is evident from the conclusion of the District Court and the opinions of the Court of Civil Appeals and Texas Supreme Court, none of the courts below passed upon any issue regarding the Tenth Amendment of the United States Constitution. The Texas Supreme Court did not hold that P. L. 91-156 imposed the franchise taxes at issue upon Petitioners.

REASONS FOR DENYING THE WRITS

Respondents will address the question presented by showing that:

> 1. Petitioners' federal rights, statutory or constitutional, were not denied.
>
> 2. The decision of the Texas Supreme Court was entirely based upon an independent ground of state law, i.e. Article 7 of House Bill 730.
>
> 3. Petitioners did not adequately preserve their federal questions to invoke the jurisdiction of this Court.

1. Petitioners have argued that the Texas Supreme Court's application of Public Law 91-156 is an unconstitutional encroachment under the Tenth

Amendment of the United States Constitution upon the State's power to impose its own taxes. Respondents submit that there has been no such interference by federal law with the franchise tax statutes at issue, that the taxes imposed upon Petitioners are based upon state and not federal statutes, and that the Texas Supreme Court simply followed the mandate of P. L. 91-156 and federal statutory and case law in properly construing P. L. 91-156.

In treating national banks principally located in Texas as Texas payors for purposes of the dividends and interest such banks paid to Petitioners, Respondents and the Texas Supreme Court merely applied the language of Public Law 91-156 that, "For the purpose of any tax law enacted under authority of...any State," (the Texas Franchise Tax Act being such a law) "a national bank shall be treated as a bank organized and existing under the laws of the State...within which its principal office is located." National banks were thus treated as Texas payors under the Texas "location of payor" rule because that is how Texas state banks (which are organized and exist under the laws of Texas) are treated under such rule.

In *First Nat. Bank v. Buder*, 8 F.2d 883 (E.D. Missouri 1925), reversed on other grounds at 16 F.2d 990 (8th Cir. 1927), cert. den. 274 U.S. 743, the district court addressed a similar contention of unconstitutional interference by §5219 as Petitioners make herein and responded:

> An able and most plausible argument is made upon the contention that section 5219, supra, is unconstitutional, for that Congress has no power to delimit, or meddle with, the several sovereign states touching their inherent power to levy and collect taxes for their own several uses. But I cannot read the cases of McCulloch v. Maryland, 4 Wheat. 316,

> 4 L. Ed. 579, Osborn v. Bank of U.S., 9 Wheat. 738, 6 L. Ed. 204, and Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481, in any other light than that no power exists in the states to tax national banks at all, except and until Congress shall so permit, and that such permission, when granted, may be hedged about with conditions, which conditions must be met by the states before they may tax these banks. Bank of Gulfport v. Adams, 258 U.S. 362, 42 S. Ct. 323, 66 L. Ed. 661; Des Moines Bank v. Fairweather, 263 U.S. 103, 44 S. Ct. 23, 68 L. Ed. 191; Bank of California v. Richardson, 248 U.S. 476, 39 S. Ct. 165, 63 L. Ed. 372.

8 F.2d at 883. While the Eighth Circuit reversed the district court's decision on other grounds, it agreed with the lower court's analysis of §5219's constitutionality by reiterating the settled law:

> The defendants give various reasons for upholding the assessment in question.
>
> They urge the unconstitutionality of section 5219 and the amendment of 1923. We think it is now too late to attempt to overturn the well-settled doctrine that national banks are instrumentalities of the United States, subject to its paramount authority, and taxable by the states only to the extent and in the manner expressly permitted by Congress.

16 F.2d at 992.

While the foregoing cases did not involve Public Law 91-156 as it is presently worded, *First National Bank and Trust Company of Oklahoma City v. Parham*, 515 P.2d 1374 (Okla. 1973) considered the same P. L. 91-156 at issue herein and construed such statute as did the Texas Supreme Court. The Oklahoma Supreme Court held:

> The language of the newly amended federal statute is *mandatory* in nature in that it expressly requires that for the purpose of tax laws enacted by the various states '...a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.'
>
> ****
>
> Thus, it was recognized that the amendment would have the effect of destroying the in lieu tax whereby the states chose the method of taxing national banks. *Under the amendment, national banks are treated the same as state banks for tax purposes.* Because the language of the amendment is mandatory, *the states have no other option, but to treat national banks the same as state banks for tax purposes...*

Id. at 1376. (Emphasis added).

The interpretation of a state's tax statutes by a state court in conformity with congressional legislation relating to national banks is not a novel proposition. In *First Nat. Bank of St. Joseph v. Township of St. Joseph*, 46 Mich. 526, 9 N.W. 838 (1881), the Michigan Supreme Court, in analyzing §5219, wrote: "The power to tax at all comes from the act of congress, and it must be obeyed in thorough good faith. Our statute was passed for the express purpose of conforming to the law as existing in 1869, and as substantially reenacted by the Revised Statutes of 1872. In our judgment the state law and the act of congress must be read together, *and the state officers must act in harmony with the latter.*" *Id.* at 839. (Emphasis added).

In analyzing §5219 of the Revised Statutes, the predecessor to P. L. 91-156 (12 U.S.C. §548), this Court

stated in *Bank of California v. Richardson*, 248 U.S. 476, 483 (1919):

> There is also no doubt from the section that it was intended to *comprehensively control the subject* with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. *All possibility of dispute to the contrary is foreclosed by the decisions of this court. People v. Weaver*, 100 U.S. 539, *Mercantile Bank v. New York*, 121 U.S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U.S. 664; *Covington v. First National Bank*, 198 U.S. 100. (Emphasis added).

The exclusive control which §5219 exercised over a state's treatment of national banks for tax purposes was explained in *Owensboro National Bank v. Owensboro*, *supra*, as follows:

> This section, then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. *Any state tax therefore which is in excess of and not in conformity to these requirements is void.*

173 U.S. at 669. (Emphasis added).

Recently, in *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), *Owensboro* and *Richardson* were followed as the Court observed:

> A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless

> authorized by Congress, to tax federally created, or, as they are presently called, national banks.

Id. at 340. The Court continued its unwavering interpretation of 12 U.S.C. §548 by noting: "It seems clear to us from the legislative history that 12 U.S.C. §548 was intended to prescribe the only ways in which the States can tax national banks. And this is certainly not a novel interpretation of the section, as shown by previous decisions of this Court." *Id.* at 343.

Thus, from the foregoing authorities it can be readily and easily deduced that state tax statutes must accede to mandatory congressional enactments concerning the treatment of national banks for state tax purposes (such as P. L. 91-156), and not vice-versa as Petitioners argue. This concept is certainly in line with the clear language of P. L. 91-156 and 12 U.S.C. §42 which provides: "The provisions of all Acts of Congress relating to national banks shall apply in the several states, the District of Columbia, the several Territories and possessions of the United States, and the Commonwealth of Puerto Rico." Indeed, when Respondent Comptroller of Public Accounts decided to treat national banks principally located in Texas as Texas state banks, and thus as Texas payors under the State's "location of payor" rule and the franchise tax law, such action was in complete harmony with P. L. 91-156 and 12 U.S.C. §42.

The courts of Texas have consistently followed the letter and spirit of 12 U.S.C. §42 as seen by *Grayson County State Bank v. Calvert*, 357 S.W.2d 160, 162 (Tex. Civ. App. -- Austin 1962, writ ref'd n.r.e.) ("the several states lack power to tax National bank shares except as expressly permitted by Congress") and *Security National Bank of Lubbock v. Washington Loan and Finance Corporation*, 570 S.W.2d 40, 42 (Tex. Civ. App. -- Dallas 1978, writ dism'd) ("12 U.S.C.A. §94...is a

mandatory venue statute which requires suits against national banks to be filed in the county or district of their residence...").

Moreover, in direct contravention of Petitioners' encroachment theory under the Tenth Amendment, the Legislature of the State of Texas has incorporated federal law within its taxation statutes in areas other than the "location of payor" rule. The incorporation of this federal law is not used by Texas as a substitute for its own tax laws, but is used as a *measure* of taxes the State itself imposes. See Article 12.19(3) of the Franchise Tax Act, Tax.-Gen., Title 122A, V.T.C.S. (Appendix A). See also Articles 14.015(4)(5), 14.11(A), 14.11(C)(1)(2), and 14.12 of the Texas Inheritance Tax Act, Tax.-Gen., Title 122A, V.T.C.S. (Appendix B).

Contrary to Petitioners' Bank Holding Companies' argument under *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181 (1933) and *Davenport Bank v. Davenport Board of Equalization*, 123 U.S. 83 (1887), Public Law 91-156 has not abridged "the taxing power of" Texas "in respect of other property" nor has it controlled "State action in respect of other matters." 288 U.S. 187, 188. No state tax statute has been thwarted, limited, diluted or abridged in any manner in this case. To the contrary, the Texas "location of payor" rule has continued to function within the State's franchise tax laws and has placed national banks within its confines as Texas payors in accordance not only with the terms of P. L. 91-156, but also within the boundaries of the rule itself. *The Chase Manhattan Bank, N.A. v. The Finance Administration of the City of New York*, ___U.S.___, 59 L. Ed.2d 445, 99 S.Ct. 1201 (1979), cited by all Petitioners, actually favors Respondents' position herein. In *Chase Manhattan* this Court held the attempted assissment by New York City of its rent and occupancy tax as unauthorized under Public Law 91-156's "temporary provisions", a holding which is consistent with Respondents' arguments that the

treatment of national banks for purposes of state taxation is controlled by paramount federal law.

Consequently, in view of the foregoing federal and state law cited and analyzed by Respondents, the Texas Supreme Court was correct in following the edict of P. L. 91-156 in treating national banks principally located in Texas as Texas state banks (and therefore as Texas payors) for purposes of the franchise tax paid by Petitioners and other corporations doing business in Texas. No federal statute imposed the Texas franchise taxes at issue upon Petitioners. All taxes at issue are subject to the Texas Franchise Tax Act. (See Petitioners', the State's, Application for Writ of Error in the Supreme Court of Texas, pp. 33-34).

2. Having correctly followed the mandatory language of P. L. 91-156 and having also correctly applied such statute to the State's "location of payor" rule, the Texas Supreme Court based its decision upon independent grounds of state law that Article 7 of House Bill 730 did not exempt Petitioners from the taxes at issue. (Pet. Reidy's App. C, C-2). The Texas Supreme Court specifically addressed the issue of whether Petitioners are "institutions affected" by P. L. 91-156 under the language of Art. 7 of H. B. 730. (Pet. Reidy's App. C, C-5). The court then noted that Petitioners' claims amounted to a claim for exemption under Art. 7 (Pet. Reidy's App. C, C-6). The court specifically concluded that, "...there is no reason for us to presume that the Legislature sought to exempt national bank holding companies and corporate holders of national bank certificates of deposit from a franchise tax computed on income received from national banks located in this state." (Pet. Reidy's App. C, C-10).

The foregoing analysis and a simple examination of the Texas Supreme Court's opinion shows that it turned

entirely upon independent matters of state law, the interpretation of Article 7 of House Bill 730. As stated in *Bank of California v. Richardson*, 248 U.S. 476, 481: "The decision below, in so far as it rested upon the state law, is binding and we put that subject out of view." As stated in *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975):

> [A] State's highest court is the final judicial arbiter of the meaning of state statutes ..., and therefore our review of the holding of a state court respecting the legal incidence of a state excise tax is guided by the following: 'When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation, it will be deemed conclusive.'

Thus, the correctness of the Texas Supreme Court's ruling under Art. 7, H.B. 730, does not warrant review by this Court, since such ruling is the interpretation by the highest court of the state of that state's statutes. *McLeod v. Dilworth Co.*, 322 U.S. 327, 328-330 (1944); *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272; *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 194 (1910); *Alabama v. King & Boozer*, 314 U.S. 1, 9-10 (1941).

Because the Texas Supreme Court construed "institutions affected thereby" as meaning only banks in Art. 7, H. B. 730, its decision rested on an independent and adequate non-federal ground, and this Court lacks jurisdiction to review that decision. *Viator v. Stone*, 336 U.S. 948 (1948). Only the State Supreme Court can speak with final authority on who bears the tax burden under a state statute. *Boston Chamber of Commerce v. Boston, supra.* In the case at bar the Texas Supreme Court spoke with final authority on who benefits from

the exemption of Art. 7 of H.B. 730, and the court specifically excluded Petitioners from such exemption.

3. Petitioners have not adequately preserved the federal question involving the issue of constitutionality under the Tenth Amendment of the United States Constitution so as to properly invoke this Court's jurisdiction. To raise a federal constitutional issue under 28 U.S.C. §1257, it must have been raised, preserved and passed upon in the state courts below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1975). Petitioners, Bank Holding Companies, did not plead a violation of the Tenth Amendment by P. L. 91-156, but clearly plead the exemption of Art. 7, H.B. 730. (R. 14-22). Petitioner Reidy also failed to plead the Tenth Amendment and also clearly plead the exemption of Art. 7. Interestingly, Petitioner Reidy plead a violation of the Fourteenth Amendment of the United States Constitution (R. 115-123), but it did not raise a federal question under the Fourteenth Amendment before the Court of Civil Appeals or the Texas Supreme Court. (See Brief of Appellant Reidy in the Court of Civil Appeals and Reidy's Answer to Application for Writ of Error and Motion for Rehearing in the Texas Supreme Court).

Also, the Tenth Amendment was not raised in Petitioners' Motions for New Trial. (R. 183-185, R. 188-190). Petitioners continued to fail to raise the Tenth Amendment as an issue in the Court of Civil Appeals. (See Brief of Appellant Reidy and Appellants-Bank Holding Companies' Brief in the Court of Civil Appeals). Without the Tenth Amendment before the Court of Civil Appeals, it is not surprising that such court did not pass upon Petitioners' Tenth Amendment arguments. (Pet. Reidy's App. B). Petitioners did not *raise* arguments under the Tenth Amendment until their Motions for Rehearing in the Texas Supreme Court so the Texas Supreme Court did not *pass* upon Petitioners' arguments under the Tenth Amendment as seen by such

court's opinion. (Pet. Reidy's App. C).

As this Court explained in *Cardinale v. Louisiana*, *supra*, "In *Cromell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, ...vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.'" 394 U.S. at 438. In *C.I.O. v. McAdory*, 325 U.S. 472, 477 (1945), this Court observed: "Further, the contention that §16 conflicts with the National Labor Relations Act...was *not passed on by the Circuit Court*, was not raised by assignment of error in Alabama Supreme Court, and *that court did not pass on that question either in its opinion* in this case or in its opinion in the Alabama State Federation of Labor case which it adopted as controlling." (Emphasis added). To reiterate neither the District Court in its Conclusion of Law (the Texas equivalent to the Alabama Circuit Court in *C.I.O.*) nor the Court of Civil Appeals or the Texas Supreme Court in their opinions passed upon Petitioners' Tenth Amendment arguments.

Petitioners for the first time raised arguments under the Tenth Amendment as assignments of error in their Motions for Rehearing before the Texas Supreme Court. As explained earlier no such assignments were made from the District Court's judgment which was adverse to Petitioners. As stated in *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945): "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here..." As this Court admonished in *C.I.O. v. McAdory*, *supra*, "Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance

here." 325 U.S. at 477. Because Petitioners failed to preserve their assignment of error based upon a violation of the Tenth Amendment throughout the proceedings in the state courts below, this Court is therefore without jurisdiction to consider Petitioners' petitions for a writ of certiorari.

CONCLUSION

The petitions for a writ of certiorari should be dismissed for want of jurisdiction, or in the alternative such petitions should be denied.

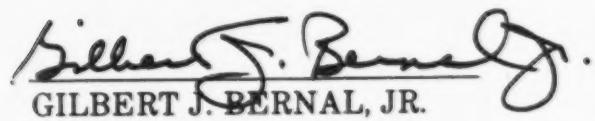
Respectfully submitted,

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NOS. 79-652 and 79-653

* * *

IN THE

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OCTOBER TERM, 1979

REIDY INTERNATIONAL, INC.,
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CORPORATION OF TEXAS, ET AL.,
Petitioners,

V.

BOB BULLOCK, COMPTROLLER
OF PUBLIC ACCOUNTS OF THE
STATE OF TEXAS, ET AL.,
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* * *

PROOF OF SERVICE

I hereby certify that on this 28 day of November, 1979, three copies of Respondents' Brief In Opposition were mailed, postage prepaid, to Willis Witt, 500 Gulf Building, Houston, Texas 77002, C.W. Wellen, Bank of the Southwest Building, Houston, Texas 77002, Keith A. Jones, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036, and Harry M. Reasoner, 1800 First City National Bank Building, Houston, Texas 77002, counsel for Petitioners. I further certify that all parties required to be served have been served.

Gilbert J. Bernal Jr.

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APPENDIX A

Art. 12.19. Optional Use of Short Form Return.

(3) The Comptroller of Public Accounts shall prescribe the form of reports to be made by any corporation electing to pay its franchise tax under the provisions of this Article. The Comptroller of Public Accounts may require such reports to contain any or all information required under Article 12.08, 12.09, 12.11 or 12.12 of this Chapter.

There shall be submitted with the report a signed copy of the corporation's Federal income tax return for the period described in Subsection (2) of this Article. All franchise tax reports and income tax returns furnished to the Comptroller of Public Accounts under the provisions of this Article shall be confidential in nature and treated as such by the Comptroller of Public Accounts under the same conditions as provided in Article 12.10. The Comptroller of Public Accounts or the State Auditor may in the execution of this Article cause the books of any corporation electing to pay franchise taxes under this Article to be examined, whether such books can be located within this State or any other state within the United States. The Comptroller of Public Accounts may make any rules or regulations necessary for the administration of this Article.

APPENDIX B

Art. 14.015. Exempt Transfers.

The inheritance tax imposed by Article 14.01 shall not apply to the following transfers of property:

(4) The value of an annuity or other payment received by any beneficiary (other than a personal representative of the decedent) which qualifies for exemption from the Federal Estate Tax under Subsections (c), (d), or (e) of Section 2039 of the Internal Revenue Code of 1954, as now or hereafter amended, said Subsections (c), (d), and (e) being codified as 26 United States Code Annotated Sections 2039(c), (d), (e).

(5) Members of the Armed Forces Dying in a Combat Zone. Any military pay or other military allowances paid to the beneficiaries of a Texas resident who, while in active service of the armed forces of the United States, was killed in action in a combat zone or was legally declared dead following being classified by the armed forces as missing in action. For purposes of this Subsection, "combat zone" means any area which the President of the United States by executive order designates as an area in which the armed forces are or have engaged in combat.

Art. 14.11 Value of Property Transferred.

(A) The inheritance tax imposed by Article 14.01 shall be imposed upon the actual market value of taxable property transferred, if it has a market value, and in case it has none, then its real value. Any bonds of the United States, saving notes or other obligations which, upon the death of the decedent, constitute a part of his estate, and which may be and are received, by the United States at par and accrued interest, in payment of any estate or inheritance taxes or any other tax liability imposed by the United States shall for Texas inheritance tax purposes be valued in such estate at the amount for which same are used in payment of any such Federal tax liability.

(C) Determining Value. (1) If the Comptroller shall deem the value of any property reported by the personal representative to be incorrect, he may appraise the property or have it appraised to determine the correct value.

(2) The Comptroller may take into consideration the Federal valuation of any property for Federal estate tax purposes and may value or revalue any or all property in an estate for a determination of the tax levied by this Chapter.

Art. 14.12. Additional Inheritance and Transfer Tax.

(A) Impose Additional Tax. In addition to the inheritance tax already levied by this State under existing laws, an inheritance and transfer tax is hereby levied upon the net estate of every decedent dying after this Act shall take effect, and whose estate, or any portion thereof, is, or hereafter shall be, made taxable under the inheritance tax laws of this State, or that may be subject to such taxes under any law of this State that may be hereinafter enacted. Said tax shall be, and is, levied upon the entire net value of the taxable estate of the decedent situated and taxable in the State of Texas, and the tax on each such estate be equal to the difference between the sum of such taxes due this State as inheritance or transfer taxes and eighty percent (80%) of the total sum of the estate and transfer taxes imposed on such estate by the United States Government under the Revenue Act of 1926, by reason of the property of such estate which is situated in this State and taxable under the laws of this State.

(B) When No Tax Due. In the event the amount of inheritance and transfer taxes assessed against any certain estate under the inheritance tax laws of this State shall equal or exceed eighty per cent (80%) of the estate or transfer taxes assessed and computed by the United States under the Revenue Act of 1926, against

said estate or property belonging thereto and situated within the State of Texas, then no additional taxes shall be collected hereunder, it being the purpose and intention of this Article to collect only a sufficient additional tax when necessary, for the State to get full benefit of the eighty per cent (80%) credit to the States provided for by Section 301, Chapter 27, of the Federal Revenue Act of 1926.

(C) Tax on Estate Subject to Federal Tax But on Which No State Tax is Due. Where no inheritance tax is imposed on an estate, which is situated in this State, under the laws of this State, by reason of its value not exceeding in value the amount of exemptions, and an estate tax is imposed on such estate by the Federal Government, then there shall be, and is hereby levied and shall be collected from such estate, an inheritance or transfer tax sufficient in amount to equal eighty per cent (80%) of said tax imposed by the Federal Government under the Revenue Act of 1926, on that portion of said estate which is situated in the State of Texas.

In computing and determining the rate of the tax in such cases named in this Section, the State Comptroller shall compute the same upon the net valuations of said estate as determined and used by the United States in computing the amount of the Federal Government tax due upon said estate, and said tax shall be paid from the whole of such estate before partition and distribution among the joint or several owners of same.

(D) Computation of Tax. In determining what is eighty per cent (80%) of the United States estate tax mentioned in the preceding Sections, the same shall be computed as eighty per cent (80%) of such taxes actually assessed and determined by the Federal Government under the Revenue Act of 1926, against every estate situated wholly in this State, or in case an estate is

situated partly in this State and partly outside of this State, then such eighty per cent (80%) shall be computed as eighty per cent (80%) of the total amount of the Federal taxes finally determined and assessed by the Federal Government under the Revenue Act of 1926, on and against that part of the estate situated in the State of Texas, and said amount of Federal tax shall be determined by multiplying the total Federal estate tax on the entire estate by a percentage which shall be the same percentage as the percentage of the net estate located in Texas is to the total net estate of the decedent, wherever located, before deducting specific exemptions.

(E) Act Not to Increase Combined Tax Due to State and Federal Government. This Article shall always be construed so as not to increase the total amount of taxes payable to the State and the Federal Government combined upon the estates of decedents, the only purpose of said additional tax being to take full advantage of the eighty per cent (80%) credit allowed by the Federal Revenue Act of 1926, to those who have paid any estate, inheritance, legacy, or succession tax to any state or territory, or the District of Columbia, in respect to any property included in the decedent's gross estate.

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Petitioners,

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

REPLY MEMORANDUM FOR PETITIONERS

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1. Respondents argue that the Supreme Court of Texas, in upholding the imposition of increased state taxes upon petitioners, was merely following the "mandate" or "edict" of Pub. L. 91-156. Br. in Opp. 7, 13. In so arguing, respondents make it clear that this case squarely presents the problem of federal determination of and interference with state taxation of nonbanking corporations.

Of course, petitioners believe that respondents and the Supreme Court of Texas have misconstrued Pub. L. 91-156. *See* Pet. 8-10. But if, as respondents argue, the federal statute did mandate the imposition of additional state taxes upon petitioners, then the statute is unconstitutional as so applied. *See* Pet. 10-12.

Respondents completely miss the point of the constitutional issue in this case. In purporting to address that issue, they argue only the well established proposition that the extent to which a state may tax national banks depends upon federal law. Br. in Opp. 6-13. No one disputes this point, but it is wholly irrelevant. This case does not concern the taxation of national banks. The constitutional issue here is whether the federal government has authority to require a state to impose additional taxes upon nonbanking corporations. Petitioners have shown that the federal government lacks such authority, and respondents have made no argument to the contrary.

2. Respondents' argument that the decision of the Supreme Court of Texas rests upon an independent state ground, Br. in Opp. 13-15, is frivolous. Respondents rely upon the court's determination that petitioners were not covered by 1971 Tex. Gen. Laws, Ch. 292, art. 7, § 1 ("H. B. 730"), which provides in pertinent part that "[t]he passage of Public Law 91-156 . . . shall not operate to impose or permit the imposition of any additional tax or taxes upon the institutions affected thereby."[1] But the court's construction of H. B. 730, standing alone, was not adequate to support the judgment below.

Respondents have contended throughout the litigation that the additional state taxes assessed against petitioners were justified and required by Pub. L. 91-156. Petitioners countered that Pub. L. 91-156 neither could nor did require the imposition of additional taxes on nonbanking corporations and that, in any event, H. B. 730 barred such imposi-

[1] If respondents are correct that Pub. L. 91-156 is a mandatory edict, then there is substantial doubt whether the State of Texas could exempt from the operation of Pub. L. 91-156 any taxpayer truly subject to that federal law. In any event, petitioners have not sought review of the holding below concerning the scope of H. B. 730.

tion. The determination by the court below on the second issue, that H. B. 730 did not bar the possible application of Pub. L. 91-156 to petitioners, obviously was not a sufficient basis for disposition of the entire case. By itself, that determination left open the more fundamental federal questions of just what Pub. L. 91-156 did and constitutionally could require. The judgment sustaining the imposition of the additional state taxes necessarily was grounded in the court's agreement with respondents that Pub. L. 91-156 could and did require the imposition of state taxes that theretofore had not been and could not have been imposed. That judgment therefore is rooted in federal law and does not rest upon an independent state ground.

3. Respondent's argument that the federal constitutional question presented in the petition was not adequately preserved below, Br. in Opp. 15-17, is both immaterial and factually incorrect. Respondents' argument is immaterial because they implicitly concede, as they must, that the question of federal statutory construction is within this Court's jurisdiction.[2] Questions of statutory construction and constitutional validity are inextricably interrelated, with the consequence that this Court's power to construe the federal statute necessarily includes power to determine whether the statute as so construed is constitutional. Accordingly, since the Court has jurisdiction in this case to determine the proper construction of Pub. L. 91-156, *a fortiori* the Court also has jurisdiction to decide the constitutional question that depends upon that construction.

[2] The Court of Civil Appeals explicitly decided the question of construction when it held that Pub. L. 91-156 should not be construed so as to impose additional taxes on petitioners, *see* Pet. at B-9-13, and thus there can be no doubt that that question was properly before the Texas Supreme Court on writ of error, *McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964), and has been preserved for decision here.

Respondents' argument is factually incorrect because it is entirely based upon their erroneous assertion that the federal constitutional question was first raised on motion for rehearing in the Texas Supreme Court. In fact, the constitutional issue was fully briefed in the Texas Supreme Court in advance of oral argument, *see* Pet. at I-1-5, J-1-2, had been briefed in the Court of Civil Appeals as well, *see* Petitioners' Brief before Court of Civil Appeals at 3, 8, and had been put in issue in the District Court. *See* Pet. at 5-6.

The constitutional issue was raised adequately for purposes of Texas law: the original pleading, which must be construed as favorably as possible to the pleader, *see Gulf, Colorado & Santa Fe Ry. v. Bliss,* 368 S.W.2d 594 (Tex. 1963), is required only to give "fair notice" of the claim involved. Rule 47, TEX. R. CIV. PRO. *See Stone v. Lawyers' Title Insurance Corp.,* 554 S.W.2d 183, 186 (Tex. 1977). Presumably in recognition of the fact that the issue had been properly raised, respondents made no objection to its presentation in the Texas appellate courts.

Since under Texas law the federal constitutional issue was properly presented and preserved for decision below, it has been preserved for decision by this Court as well. Because "the claim of invalidity and the ground therefor were brought to the attention of the state court with fair precision and in due time . . . , the claim is to be regarded as having been adequately presented." *Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). It makes no difference that the Supreme Court of Texas did not expressly discuss the federal constitutional question. As this Court also stated in *Bryant v. Zimmerman*:

> [T]he decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.

278 U.S. at 67. By enforcing respondents' construction of Pub. L. 91-156 against petitioners, the court below necessarily denied petitioners' claim that the federal statute as so enforced would be unconstitutional. Accordingly, this Court has jurisdiction to review that claim.

For the reasons stated here and in the petition for writ of certiorari, the petition should be granted.

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